(23,820)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 669.

A. D. DANIELS, APPELLANT,

vs.

JESSIE E. WAGNER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 25, 1913.

No. 2217

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

JESSIE E. WAGNER,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon

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TRANSCRIPT OF RECORD.

LODGED
JAN - 2 1913
F. D. MONCKTON,
CLERK.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

JESSIE E. WAGNER,

Appellee.

Names and Addresses of Attorneys Upon This Appeal:

For the Appellant:

PLATT & PLATT and HUGH MONTGOMERY,
Board of Trade Bldg., Portland, Oregon

For the Appellee:

F. H. MILLS,
Klamath Falls, Oregon

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In the District Court of the United States for the District of Oregon.

Be it Remembered, That on the 26 day of January, 1911, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

[Bill of Complaint.]

In the Circuit Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JESSIE E. WAGNER,

Defendant.

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON:

A. D. Daniels, a citizen and inhabitant of the state of Wisconsin, residing at Rhinelander, in said state, brings this bill of complaint against Jessie E. Wagner, a resident and inhabitant of the state of Oregon, and residing at Klamath Falls in said state.

And thereupon your orator complains and says:

I.

That at all times herein mentioned plaintiff was and is a resident and inhabitant of the state of Wisconsin, residing at Rhinelander in said state.

II.

And thereupon your orator further shows unto

your Honors:

That at all times herein mentioned plaintiff was and is a resident and inhabitant of the state of Wisconsin, residing at Rhinelander in said state.

III.

That thereupon your orator further shows unto your Honors:

That prior to the 12th day of April, A. D., 1902, one Edward B. Perrin was the owner in fee simple, free of any lien or incumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to-wit:

> The South half of section five, township twenty-two north, range one east; the south half of section three, township twenty-two north, range two east; the south half of section thirty-five, township twenty-two north, range three east; lots one and two, section one, township twenty-three north, range three east; lot two of section one; lot three of section five, and the north half of the northeast quarter, section twenty-one, township twenty-three north, range four east G. & S. R. M.

IV.

And thereupon your orator further shows unto your Honors:

That prior to the 12th day of April, A. D. 1902, one Aztec Land and Cattle Company, Ltd., a corporation, was the owner in fee simple, free of any lien or incumbrance, of that certain property located in the

Territory of Arizona, and particularly described as follows, to-wit:

> All of sections twenty-five, twenty-seven, and twenty-nine, township sixteen north, range ten east, and the southeast quarter of section three, township nineteen north, range nine east G. & S. R. M.

V.

And thereupon your orator further shows unto your Honors:

That on or about the 12th day of April, 1902, the said described lands, mentioned in paragraphs III and IV of this bill of complaint, were included within the limits of the San Francisco Mountains Forest Reserves, pursuant to a proclamation of the president of the United States made on or about the 12th day of April, 1902, which said lands were then, and still are, non-mineral lands.

VI.

And thereupon your orator further shows unto your Honors:

That on or about the 8th day of Febuary, 1904, that certain property situated within the district of Oregon, located in the County of Klamath in the state of Oregon, and particularly described as follows, to-wit:

> The southwest quarter of the northwest quarter, the northwest quarter of the southwest quarter, section one, and the southeast quarter of the northeast quarter, section two, township thirty-seven south, range

ten east of the Willamette Meridian; and the northeast quarter of the southeast quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian;

was surveyed, unappropriated, and vacant public land of the United States, returned and characterized upon the official records of the United States as non-mineral land, free and open to entry and settlement under and in accordance with the laws of the United States governing the acquisition of public lands.

VII.

And thereupon your orator further shows unto your Honors:

That on or about the 4th day of June, 1897, the Congress of the United States passed an act entitled: "An act making appropriation for sundry civil expenses of the government, for the fiscal year ending June 30, 1898, and for other purposes:" which act provides among other things, as follows, to-wit:

"That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent

to cover the tract selected: Provided further, That in cases of unperfected claim the requirements of the laws respecting settlements, and residence, and improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

VIII.

And thereupon your orator further shows unto your Honors:

That on or about the 2nd day of February, 1904, the said Edward B. Perrin, by P. S. Brumby, his attorney in fact, did, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set forth in paragraph VI of this complaint, relinquish and convey unto the United States of America those certain tracts of land hereinbefore described, in paragraps III and IV of this complaint, and recorded in deed of conveyance in the office of the recorder of the county in which the said lands are situated, and subsequently, an on or about the 8th day of February, 1904, filed with the Register and Receiver of the United States land office at Lakeview, Oregon, the said deed so recorded, together with a full and true and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, showing him to be the owner in fee simple, free and clear of any lien or incumbrance, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time made a lieu

selection of the tracts hereinbefore described in paragraph VI of this complaint, together with other lands.

IX.

And thereupon your orator further shows unto your Honors:

That on or about the 2nd day of February, 1904, the said Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, did, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set forth in paragraph VII of this complaint, relinquish and convey unto the United States of America those certain tracts of land hereinbefore described in paragraphs III and IV of this complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the said lands are situated, and subsequently, and on or about the 8th day of February, 1904, filed with the Register and Receiver of the United States land office at Lakeview, Oregon, the said deed so recorded, togther with a full and true and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, showing it to be the owner in fee simple, free and clear of any lien or incumbrance, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time made a lieu selection of the tract hereinbefore described in paragraph VI of this complaint, together with other lands.

X.

And thereupon your orator further shows unto your Honors:

That on or about the 28th day of June, 1902, the State of Oregon, filed upon the said tracts so selected, together with certain other lands, certain instruments purporting to be school indemnity lists, which lists were numbered Lists 178 and 188, respectively, which said lists were duly and regularly accepted and filed by the Register and Receiver of the United States land office at Lakeview, Oregon, and thereupon were regularly transmitted to the Commissioner of the General Land Office of the United States government at Washington, D. C., to await the acceptance and approval of the land department of the United States government, but that, owing to the invalid character of the base lands tendered in said lists, the said lists were held for cancellation, and were subsequently, and during the months of March and August, 1904, finally cancelled upon relinquishments of said lists filed on behalf of the State of Oregon.

XI.

And thereupon your orator further shows unto your Honors:

That prior to the said cancellation of said school indemnity lists 178 and 188, and before any action whatsoever had been taken by the proper officers of the land department of the United States except said Register and said Receiver relative to the acceptance and rejection of the said indemnity lists, the state of Oregon, acting through the officers of the

Oregon state land board, sold to various bona fide purchasers, for value, the timber lands upon which the said school indemnity lists 178 and 188 had been filed, although the said state had not at the time of such sale, nor has it at any time since ever acquired, or owned, any right, title or interest in or to the said lands upon which the said lists were filed, including those lands more particularly described in paragraph VI of this bill of complaint, which said lands described in said paragraph VI were, for a valuable consideration and in good faith, and without any knowledge whatsoever of the irregularity of the proceedings which had taken place in connection with the sale thereof, or of the invalid character of the base lands which were tendered to the Federal government as the basis for the said selection by the State of Oregon purchased from the said State of Oregon by the plaintiff herein.

XII.

That thereupon your orator further shows unto your Honors:

That subsequently and upon the discovery of the fact that all the proceedings in connection with the attempt to acquire said lands by filing of said lists 178 and 188, so filed as aforesaid, and more particularly those lands hereinbefore described in paragraph VI of this bill of complaint, were irregular, and that by virtue of the filing of said lists the State of Oregon had acquired no interest and did not then have any right, title or interest in or to the said lands so select-

ed, owing to the invalid character of the base land which had been tendered in exchange therefor, and the further fact that the said selected land had, nevertheless, been sold by the State of Oregon to many innocent purchasers for value, the State of Oregon, acting through the Honorable George E. Chamberlain, its governor, entered into negotiations with the Department of the Interior of the United States for the purpose of arriving at some arrangement wherein and whereby the interest of these bona fide purchasers from the state might be protected, and as a result of such negotiations, and on or about the 17th day of October, 1903, a letter was promulgated and transmitted to the governor of the state of Oregon by the Honorable Secretary of the Interior of the United States, of which letter the following is in part substantially a copy, to-wit:

> "It (the state) may within sixty days allowed for appeal amend its selection by the substitution of a valid base, or, if unable to furnish such a base, it may, upon receipt of notice that the selection is held for cancellation, make a formal relinquishment of the selection, and give same to its grantee. While the selection is of record uncancelled the land is segregated thereby, and no right can be acquired by the presentation of an application therefor (29 L. D. 29), but the purchaser holding the state's relinquishment may present it with his application, and thereby secure the right of entry."

XIII.

And thereupon your orator further shows unto your Honors:

That thereafter and in accordance with the terms of the arrangement thus agreed upon, as evidenced by the said letter of the Secretary of the Interior, the said lieu selections so made as alleged in paragraphs VIII and IX of this bill of complaint were made by the said Edward B. Perrin, by P. S. Brumby, his attorney in fact, and Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, respectively, in the interest, and for the benefit, of the plaintiff herein, and for the purpose of protecting the interests of the plaintiff in and to said selected land acquired by virtue of the purchase so made by the plaintiff from the state of Oregon, as alleged in paragraph XI of this complaint, and at the time of making said lieu selection so made as alleged in said paragraphs VIII and IX, and on the 8th day of February, 1904, the said lieu selectors, the said Edward B. Perrin, by P. S. Brumby, his attorney in fact, and Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, respectively, presented, together with the application for selections, as in paragraphs VIII and IX of this complaint alleged, a relinquishment from the State of Oregon of all its right, title, and interest in and to the said selected land, which said relinquishment was made by the State of Oregon, in the interest and for the benefit of the plaintiff herein, as grantee.

XIV.

And thereupon your orator further shows unto your Honors:

That, although the said forest lieu selections so made as alleged in paragraphs VIII and IX of this bill of complaint were in all respects regular and in accordance with the requirements of said act of Congress of June 4, 1897, set forth in paragraph VII of this complaint, and in accordance with the requirements of the Secretary of the Interior in his letter of October 17, 1903, hereinbefore set forth in paragraph XII of this bill of complaint, that, nevertheless, the local officers of the United States land office at Lakeview, Oregon, did wrongfully and in contravention of the vested rights of the said lieu selectors and the plaintiff herein, and on or about the 4th day of March, 1904, refuse and neglect to accept and properly enter upon the records of the said office as of date the 8th day of February, 1904, the said application for said lieu selections upon the ground that the said lieu selections were in conflict with certain homestead and timber and stone applications, which were made subsequently to the 8th day of February, 1904, and subsequent to the presentation of the application for said lieu selections, together with said relinquishments.

XV.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the ..... day of ....., 19....., the said lieu selectors and the plaintiff herein together with other

lieu selectors who had made other selections in the interest and for the benefit of the plaintiff herein, appealed from the ruling of the local office, upon which appeal the said ruling was affirmed by the Commissioner of the General Land Office, but that subsequently, and on or about the 25th day of October, 19....., the Honorable Secretary of the Interior, acting through the Honorable Frank Pierce, first assistant secretary, reversed the said decision of the said commissioner and directed that the said lieu selections so made as alleged in paragraphs VIII and IX of this complaint, together with other selections similarly made, be allowed as of date February 8, 1904, and so directed said Register and Receiver.

XVI.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 6th day of December, 1905, the said lieu selections referred to in paragraphs VIII and IX of this complaint, together with other selections, were again rejected by the said local officers of the United States government at Lakeview, Oregon, upon the ground that the land covered thereby had been withdrawn for the purpose of what was known as the Klamath River Project, which action of the said Register and Receiver was subsequently reversed by order of the Commissioner of the General Land Office.

XVII.

And thereupon your orator further shows unto your Honors:

That on or about the 5th day of March, 1906, and the 11th day of June, 1906, other objections were made by the Register and Receiver of the United States Land Office at Lakeview, Oregon, to the allowance of the said lieu selections referred to in paragraphs VIII and IX of this complaint, together with other lieu selections, which objections were sustained on appeal, by the Commissioner of the General Land Office and by the Department of the Interior, under date of June 20, 1906, but that on or about the 15th day of May, 1907, the said Department of the Interior recalled its decision of June 20, 1906, and entered an order directing the reinstatement of the said lieu selection referred to in paragraphs VIII and IX of this complaint, together with other selections, as of date February 8, 1904, and ordered that notice be given to all parties who had made entries upon said lands subsequently to the cancellation of said indemnity lists 178 and 188, hereinbefore referred to in paragraph X of this complaint, which said notice was duly given, as directed.

XVIII.

And thereupon your orator further shows unto your Honors:

That subsequently, and as a result of the notice so given, a petition for a review of the departmental decision last referred to was filed on behalf of one Archie Johnson, a claimant of part of the said lands embraced by said indemnity lists 178 and 188, which petition set forth the existence of an alleged conspiracy, averred to have been formed for the purpose of

acquiring all of the said lands, in the first instance, and that the said lieu selections, so made as aforesaid, were in accordance with, and constituted a part of said alleged conspiracy, and that the plaintiff herein was not a purchaser in good faith of said land described in paragraph VI of this complaint, or any part thereof which petition for review was allowed, upon the ground that all previous hearings before the Department of the Interior, so had as hereinbefore alleged, were purely ex parte and were, consequently, not proper proceeedings in which to determine the merits of the adverse claims to the lands in question, for the purpose of basing a final decision thereon, and therefore an order was made directing that a final hearing should be held before the Register and Receiver of the United States land office at Lakeview, Oregon, for the purpose of determining the respective merits of various claims to the lands embraced within the said school indemnity lists 178 and 188.

XIX.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 25th day of May, 1908, said hearing so ordered, as aforesaid, was duly and regularly had before the Register and Receiver of the United States land office at Lakeview, Oregon, the plaintiff herein appearing in person and by attorneys, and the defendant and other adverse claimants appearing in person or by attorneys, at which time the said Register and Receiver, after duly hearing the respective parties, held that the various

homestead and timber and stone entries hereinbefore referred to in paragraph XIII of this complaint should be allowed to remain intact, which decision was subsequently, and on or about the ..... day of ..... reversed by the Honorable Commissioner of the General Land Office, who held that the lieu selections referred to in paragraphs VIII and IX of this complaint, together with other selections made in the interest of the plaintiff herein, had been duly and regularly made and should be allowed to remain intact.

XX.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the ..... day of .....19....., an appeal from the last named decision of the Honorable Commissioner of the General Land Office was taken by certain homestead and timber and stone claimants, including the defendant to the Department of the Interior, which department, acting through the Honorable Frank Pierce, its first assistant secretary, found and held, that, although the said lieu selection so made as alleged in paragraphs VIII and IX of this complaint, together with other selections, was filed simultaneously with the cancellation of said indemnity lists 178 and 188, and before the filing of the said homestead and timber and stone entries, made as alleged in Paragraph XIII of this complaint, and that although, from the record then before said department it fully appeared, and every material fact supported the conclusion

that the plaintiff herein was a purchaser in good faith, free from fraud of any kind, and that said homestead and other entries the entry of the defendant, were particularly made subsequent to February 8, 1904, that, nevertheless, it was within the competency of the officers of the land department of the United States to allow the said homestead and timber and stone entries to be made, regardless of the vested rights of the plaintiff herein, and that, therefore, the said lieu selection so made, as alleged in paragraphs VIII and IX of this complaint, together with other selections, would be denied in all instances where homestead and timber and stone entries had been allowed to be made by the local officers of the land department of the United States land office at Lakeview, Oregon.

XXI.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 6th day of October, 1910, and in accordance with the ruling of the decision set forth in paragraph XVIII of this complaint, a patent to the following described lands situated in the County of Klamath, in the State of Oregon, and particularly described as follows, to-wit:

> The southwest quarter of the northwest quarter, the northwest quarter of the southwest quarter, section one, and the southeast quarter of the northeast quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian; and the north-

east quarter of the southeast quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian;

was issued in the name of Jessie E. Wagner, the defendant, herein, contrary to, and in violation of the rights and equities of the plaintiff herein, and that the said patent so issued, as aforesaid, was issued by the officers of the United States government without regard to, and in contravention of, the vested rights of the plaintiff herein, and in accordance with the ruling of the Department of the Interior, as evidenced by the decision referred to in paragraph XIX of this complaint.

XXII.

And thereupon your orator further shows unto your Honors:

That this is a suit between citizens of different states, and that the amount in controversy herein exceeds the amount of Two Thousand ($2000.00) Dollars, exclusive of interest and costs.

XXIII.

And thereupon your orator further shows unto your Honors:

That he has no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, and foreasmuch as your orator is remediless in the premises, under and by strict rules of common law, and can only have relief in a court of equity where matters of this nature are recognizable and reviewable, files this, his bill of complaint, and prays:

I. That the defendant may be adjudged and decreed to hold said lands described in paragraph VI in trust for your orator, and to convey the same to your orator, and deliver to your orator, any patent or other deeds of the same in his possession, and be restrained and enjoined from hereafter setting up any claim or title to said lands or any part thereof, or in any manner intermeddling therewith, or removing any timber or other product therefrom.

II. That the defendant may be adjudged and decreed to hold any timber or other product by him or his servants or agents removed from said land, or the proceeds or manufactured product from the same, in trust for your orator, and may be decreed to account to your orator for the same, or the value thereof, and to repay to your orator said value, with interest from the date of sale, if the same has been sold by the said defendant.

III. That upon the failure of the defendant to make said conveyance and to deliver to your orator any patent or other deeds of the said lands described in said paragraph VI within a period of thirty days from the entry of the decree of this court, the said decree be adjudged and decreed to stand as a conveyance in lieu of such patent or other deeds.

IV. And your orator further prays: That your Honors may grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this Honorable Court, directed to the defendant, Jessie E. Wagner, therein and thereby commanding said defendant, under a certain penalty

therein to be named, personally to be and appear before your Honorable Court, then and there to answer, all and singular, (but not under oath, answer under oath being expressly waived) the matters and things aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

V. And your orator prays for such further relief in the premises as the nature and circumstances of this cause may require and to your Honorable Court may seem reasonable and proper.

And your orator, as in duty bound, will ever pray.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, His Solicitors.

Robert Treat Platt,
of Counsel.

[Endorsed]: Bill in Equity. Filed January 26, 1911.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 18 day of March, 1912, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

[Opinion of the Court on Demurrer to Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

In Equity.

A. D. DANIELS,

Plaintiff,

vs.

JESSIE E. WAGNER,

Defendant.

No. 3712.

PLATT & PLATT, Attorneys for Plaintiff.

F. H. MILLS, Attorney for Defendant.

BEAN, District Judge:

This is a suit for a decree declaring the defendant to hold the legal title to certain real property in Section 2, Township 37 south, Range 10 east, in trust for the plaintiff.

The facts as they appear from the bill in brief are that on June 4, 1897, Congress passed an Act providing among other things, "that in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent." 30, St. L. 36.

By virtue of the provisions of this law there was filed on February 8, 1904, in the local land office, for and on behalf of the plaintiff, deeds by the owners of certain lands in the San Francisco Mountain Forest Reserve, accompanied by the requisite abstract of title, conveying such lands to the United States, and at the same time applications were made to select in lieu thereof the land in controversy, the same being at the

time vacant unappropriated lands of the United States and open to settlement. Before the applications for exchange had been accepted or acted upon by the local land office or by it forwarded to or considered by the Commissioners of the General Land Office, the defendant applied to enter the lands so selected under the Timber and Stone Act. Subsequently such proceedings were had in the Land Department that the applications were rejected, the entry of the defendant approved, and patent issued to him.

The plaintiff now claims that by filing the relinquishments in the local land office and designating the tracts desired to be selected in lieu of that relinquished he acquired a vested right or interest in the land so selected which could not be impaired by subsequent applications to purchase the same under the Timber and Stone Act, and he seeks to invoke the rule applicable to homestead and preemption entries. I do not think the cases are at all analogous. The homestead and preemption laws were intended for the benefit of actual settlers, and so tender have the courts been of the rights of such settlers that, applying the doctrine that equity will consider that as done which ought to have been done, they have held that when a qualified entryman enters upon public lands open to settlement under the homestead or preemption laws with the intent of acquiring title thereto, he has a vested right therein, of which he can only be deprived by his failure to comply with the conditions of the law, and that one to whom the Land Department may subsequently convey the title will be decreed to

hold it in trust for the entryman. (Lytle, et al, v. St. of Arkansas, 9 How. 314). Nelson v. N. P., 188 U. S. 102.) The Act of 1897 under which plaintiff claims, however, merely signifies the willingness of the government to exchange vacant land open to settlement for an equal area of land within the limits of a forest reservation covered by a bona fide claim or patent, and no rights are acquired by the selector until his application for the exchange is approved. No method of procedure for effecting the exchange is provided by law. The general administration of the Forestry Reservation Acts, however, and the adjudication of the various questions arising therein are vested in the Land Department. It has power and authority to adopt and has adopted rules and regulations governing the procedure in relinquishing lands within a reservation and the selection of other lands in lieu thereof, of which the courts will take judicial knowledge. (Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301.) By the rules and regulations so formulated, one desiring to relinquish lands and select other lands in lieu thereof where final certificate or patent has issued, is required to make a quitclaim deed to the United States for the land offered in exchange, have it recorded in the proper county and file the same (accompanied by an abstract of title duly authenticated, showing a chain of title from the government back to the United States, to the property offered), in the local land office, and at the same time designate the particular tract which he desires in lieu of that re-relinquished. "All applications for change of entry

or settlement under this law must be forwarded by the local land officers to the Commissioner of the General Land Office for consideration, together with a report as to the status of the land applied for." (29 L. D. 575.) There is some language of Judge Ross in Olive L. & D. Co. v. Olmstead, (103 fed. 568), which is susceptible of the construction that the selector of lands under the Act of 1897 becomes the equitable owner thereof upon the filing of his deed of relinquishment and notice of selection in the local land office and the acceptance thereof by such office, but in the subsequent case of the Cosmos Ex. Co. v. Gray Eagle Oil Co., (104 Fed. 20), the learned judge explains that the Olive case was decided without reference to the rules of the Land Department regulating the procedure of applicants for exchange of lands under the Act of 1897, and in the latter case he holds that under the rules so promulgated the local land office has no authority to approve a selection but is required to refer the question to the General Land Office for its consideration, and that the selector has no vested interest in the land selected by him until the application is approved by the Land Department. This ruling was affirmed by the Court of Appeals (Cosmos v. Gray Eagle, 112 Fed. 4), and by the Supreme Court. (Cosmos v. Gray Eagle, 190 U. S. 303.) In the latter case the court said that the complete equitable title of the selector is not "made out and cannot exist until a favorable decision by that Department (General Land Office) has been made regarding the sufficiency" of the proof and his right to the

selected land, and that "there must be a decision made somewhere regarding the rights asserted by the selector of the land under the Act before complete equitable title to the land can exist. The mere filing of papers cannot create such a title. The applicant must comply with and conform to the statute, and the selector cannot decide the question for himself" and that authority to determine whether the selector has complied with the provisions of the Act and the regulations of the Department is not vested in the local land officers but in the Commissioner of the General Land Office ,and until he has approved the application, the selector is not vested with the equitable title to the land he assumes to select.

Under this rule it seems to me that the plaintiff acquires no title or right to the land selected by him by the mere filing of his application, and that it was within the power and jurisdiction of the Land Department to reject the same and award the land to a subsequent entryman under the Timber and Stone Act, and as a consequence that the plaintiff is not entitled to the relief prayed for in his bill.

The demurrer will be sustained.

Portland, Oregon, March 18, 1912.

[Endorsed]: Opinion. Filed March 18, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 18 day of March, 1912, the same being the 13 Judicial day of the Regular March, 1912, Term of said Court;

Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Sustaining Demurrer to Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

v.

JESSIE E. WAGNER,

No. 3712.

March 18, 1912.

This cause heretofore submitted upon demurrer to Bill of Complaint, came on regularly at this time for the Ruling and decision of the Court and thereupon after due consideration it is Ordered that said demurrer be and the same is hereby sustained.

And afterwards, to wit, on Thursday, the 28 day of March, 1912, the same being the 22 Judicial day of the Regular March, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Granting Leave to File Amended Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

v.

JESSIE E. WAGNER,

March 28, 1912.

No. 3712.

Now, at this time, upon motion of J. C. Bailey, At-

torney for Complainant leave is hereby granted complainant to file amended Bill of Complaint herein and it is further ordered that defendant have and hereby is granted 30 days within which to demur or plead to said amended Bill of Complaint.

And afterwards, to wit, on the 28 day of March, 1912, there was duly filed in said Court, an Amended Bill of Complaint, in words and figures as follows, to wit:

[Amended Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JESSIE E. WAGNER,

Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON:

A. D. Daniels, a citizen and inhabitant of the state of Wisconsin, residing at Rhinelander in said state, with leave of court first had and obtained, brings this, his amended bll of complaint, against Jessie E. Wagner, a resident and inhabitant of the state of Oregon, residing at Klamath Falls, in said state.

And thereupon your orator complains and says:

I.

That at all times herein mentioned plaintiff was and is a resident and inhabitant of the State of Wisconsin, residing at Rhinelander in said state.

II.

And thereupon your orator further shows unto your Honors:

That at all times herein mentioned defendant, Jessie E. Wagner, was, and is, a resident and inhabitant of the State of Oregon, residing at Klamath Falls in said state.

III.

And thereupon your orator further shows unto your Honors:

That on the 12th day of April, 1902, and immediately prior thereto, one Edward B. Perrin was the owner in fee simple, free of any lien or incumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to wit:

> The south half of section five, township twenty-two north, range one east; the south half of section three, township twenty-two north, range two east; the south half of section thirty-five, township twenty-two north, range three east; lots one and two, section one, township twenty-three north, range three east; lot two of section one; lot three of section five, and the north half of the northeast quarter, section twenty-one, township twenty-three north, range four east G. & S. R. M.,

and was the owner in fee simple of said property described in paragraph III of this amended complaint, up until the 2nd day of February, 1904.

IV.

And thereupon your orator further shows unto your Honors:

That on the 12th day of April, 1902, and immediately prior thereto, one Aztec Land and Cattle Company, Ltd., a corporation, was the owner in fee simple, free of any lien or incumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to wit:

> All of sections twenty-five, twenty-seven, and twenty-nine, township sixteen north, range ten east, and the southeast quarter of section three, township nineteen north, range nine east G. & S. R. M.,

and was the owner in fee simple of said property described in paragraph IV of this amended complaint, up until the 2nd day of February, 1904.

V.

And thereupon your orator further shows unto your Honors:

That on or about the 12th day of April, 1902, the said described lands, mentioned in paragraphs III and IV of this amended bill of complaint, were included within the limits of the San Francisco Mountains Forest Reserve, pursuant to a proclamation of the President of the United States made on or about the 12th day of April, 1902, which said lands were then, and still are, non-mineral lands.

VI.

And thereupon your orator further shows unto your Honors:

That on or about the 8th day of February, 1904, that certain property situated within the District of Oregon, located in the County of Klamath in the State of Oregon, and particularly described as follows, to wit:

> The southwest quarter of the northwest quarter, the northwest quarter of the southwest quarter, section one, and the southeast quarter of the northeast quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian; and the northeast quarter of the southeast quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian,

was surveyed, unappropriated, and vacant public land of the United States, returned and characterized upon the official records of the United States as non-mineral land, free and open to entry and settlement under and in accordance with the laws of the United States governing the acquisition of public lands.

VII.

And thereupon your orator further shows unto your Honors:

That on or about the 4th day of June, 1897, the Congress of the United States passed an act entitled: "An act making appropriation for sundry civil expenses of the government, for the fiscal year ending June 30, 1898, and for other purposes:" which act provides, among other things, as follows, to wit:

> "That in cases in which a tract covered by an unperfected bona fide claim, or by pat-

ent, is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected: Provided further, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

VIII.

And thereupon your orator further shows unto your Honors:

That on or about the 2nd day of February, 1904, the said Edward B. Perrin did, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set forth in paragraph VII of this amended complaint, relinquish and convey unto the United States of America those certain tracts of land hereinbefore described in paragraph III of this amended complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the said lands are situated, and subsequently, and on the 8th day of February, 1904, filed with the Register and Receiver of the United States land of-

fice at Lakeview, Oregon, the said deed so recorded, together with a full, true, and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed him to be the owner in fee simple of said lands, free and clear of any lien or incumbrances, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relinquished,

> The southwest quarter of the northwest quarter and the northwest quarter of the southwest quarter, section one; and the southeast quarter of the northeast quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian,

together with other lands, which selection so made was prior in time to the selection or entry of any other person or persons whomsoever, and, by virtue of said selection, there was initiated a right and interest prior in time and superior in right as against all persons whomsoever.

IX.

And thereupon your orator further shows unto your Honors:

That, on the 2nd day of February, 1904, the said Aztec Land & Cattle Company, Ltd., a corporation, did, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set forth in paragraph VII of this amended complaint, relin-

quish and convey unto the United States of America those certain tracts of land hereinbefore described in paragraph IV of this amended complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the lands are situated, and subsequently, and on the 8th day of February, 1904, filed with the Register and Receiver of the United States land office at Lakeview, Oregon, the said deed so recorded, together with a full, true, and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed it to be the owner in fee simple of said lands, free and clear of any lien or incumbrances, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relinquished,

> The northeast quarter of the southeast quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian,

together with other lands, which selection so made was prior in time to the selection or entry of any other person or persons whomsoever, and, by virtue of said selection, there was initiated a right and interest prior in time and superior in right as against all persons whomsoever.

X.

And thereupon your orator shows unto your Honors:

That regardless of said selections so made as al-

leged in paragraphs VIII and IX of this amended complaint, the defendant did, on the 23rd day of November, 1906, attempt to make a timber and stone entry upon the land described in paragraph VI of this amended complaint.

XI.

And thereupon your orator further shows unto your Honors:

That on or about the 28th day of June, 1902, the State of Oregon filed upon the said tracts so selected, together with certain other lands, certain instruments purporting to be school indemnity lists, which lists were numbered Lists 178 and 188, respectively, which said lists were duly and regularly accepted and filed by the Register and Receiver of the United States land office at Lakeview, Oregon, and thereupon were regularly transmitted to the Commissioner of the General Land Office of the United States government at Washington, D. C., to await the acceptance and approval of the land department of the United States government, but that, owing to the invalid character of the base lands tendered in said lists, the said lists were held for cancellation, and were subsequently cancelled upon relinquishments of said lists filed on behalf of the State of Oregon, on the 8th day of February, 1904.

XII.

And thereupon your orator further shows unto your Honors:

That prior to the said cancellation of said school in-

demnity lists 178 and 188, and before any action whatsoever had been taken by the proper officers of the land department of the United States, except said Register and said Receiver, relative to the acceptance and rejected of the said indemnity lists, the State of Oregon, acting through the officers of the Oregon state land board, sold to various bona fide purchasers, for value, the timber lands upon which the said school indemnity lists 178 and 188 had been filed, and the said state had not at the time of such sale, nor has it at any time since ever acquired or owned any right, title, or interest in or to the said lands upon which the said lists were filed, including those lands more particularly described in paragraph VI of this amended bill of complaint, which said lands described in said paragraph VI were, for a valuable consideration, and in good faith, and without any knowledge whatsoever of the irregularity of the proceedings which had taken place in connection with the sale thereof, or of the invalid character of the base lands which were tendered to the Federal government as the basis for the said selection by the State of Oregon, purchased from the said State of Oregon by the plaintiff herein.

XIII.

And thereupon your orator further shows unto your Honors:

That subsequently and upon the discovery of the fact that all the proceedings in connection with the attempt to acquire said lands by filing of said lists 178 and 188, so filed as aforesaid, and more particularly those lands hereinbefore described in paragraph

VI of this bill of complaint, were irregular, and that by virtue of the filing of said lists the State of Oregon had acquired no interest and did not then have any right, title, or interest in or to the said lands so selected, owing to the invalid character of the base land which had been tendered in exchange therefor, and the further fact that the said selected land had, nevertheless, been sold by the State of Oregon to many innocent purchasers for value, the State of Oregon, acting through the Honorable George E. Chamberlain, its governor, entered into negotiations with the Department of the Interior of the United States, for the purpose of arriving at some arrangement wherein and whereby the interest of these bona fide purchasers from the state might be protected, and as a result of such negotiations, and on or about the 17th day of October, 1903, a letter was promulgated and transmitted to the governor of the State of Oregon by the Honorable Secretary of the Interior of the United States, of which letter the following is in part substantially a copy, to-wit:

> "It (the state) may within sixty days allowed for appeal amend its selection by the substitution of a valid base, or, if unable to furnish such a base, it may, upon receipt of notice that the selection is held for cancellation, make a formal relinquishment of the selection, and give same to its grantee. While the selection is of record uncancelled the land is segregated thereby, and no right can be acquired by the presentation of an applica-

tion therefor (29 L. D. 29), but the purchaser holding the state's relinquishment may present it with his application, and thereby secure the right of entry."

XIV.

And thereupon your orator further shows unto your Honors:

That thereafter and in accordance with the terms of the arrangement thus agreed upon, as evidenced by the said letter of the Secretary of the Interior, the said lieu selections so made as alleged in paragraphs VIII and IX of this amended bill of complaint were made by the said Edward B. Perrin, by P. S. Brumby, his attorney in fact, and Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, respectively, in the interest and for the benefit of the plaintiff herein, and for the purpose of protecting the interests of the plaintiff in and to said selected land acquired by virtue of the purchase so made by the plaintiff from the State of Oregon, as alleged in paragraph XII of this amended complaint, and at the time of making said lieu selection so made as alleged in said paragraphs VIII and IX, and on the 8th day of February, 1904, the said lieu selectors, the said Edward B. Perrin, by P. S. Brunby, his attorney in fact, and Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, respectively, presented, simultaneously with and together with the selections, as in paragraphs VIII and IX of this amended complaint alleged, a relinquishment from the State of Oregon of all its right,

title, and interest in and to the said selected land, which said relinquishment was made by the State of Oregon in the interest and for the benefit of the plaintiff herein, as grantee, which relinquishment is the same relinquishment referred to in paragraph XI hereof.

XV.

And thereupon your orator further shows unto your Honors:

That the said forest lieu selections, so made as alleged in paragraphs VIII and IX of this amended bill of complaint, were in all respects regular and in accordance with the requirements of said act of Congress of June 4, 1897, set forth in paragraph VII of this amended complaint, and in accordance with the requirements of the Secretary of the Interior in his letter of October 17, 1903, hereinbefore set forth in paragraph XII of this amended bill of complaint, and the local officers of the United States land office at Lakeview, Oregon, did, on the 8th day of February, 1904, accept and file the said lieu selections, so made as aforesaid, in paragraphs VIII and IX of this amended bill of complaint, and did, on the 4th day of March, 1904, and at subsequent dates attempt to reject said lieu selections, so made as alleged in paragraphs VIII and IX of this amended bill of complaint, and stated, as a basis for said attempted rejection, that the said lieu selections were in conflict with certain homestead and timber and stone applications, which were made subsequently to the 8th day of February, 1904, and subsequently to the presentation and

filing of the lieu selections, together with the relinquishment of the State of Oregon, as alleged in paragraphs VIII and IX and XIII of this amended bill of colmplaint.

XVI.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 8 day of April, 1904, said lieu selectors and the plaintiff herein, together with other lieu selectors who had made other selections in the interest and for the benefit of the plaintiff herein, appealed from the ruling of the local officers of the United States land office at Lakeview, Oregon, by which ruling the said local officers attempted to reject the said lieu selections, so made as alleged in paragraphs VIII and IX of this amended bill of complaint, upon which appeal the said ruling was affirmed by the commissioner of the General Land Office at Washington, D. C., on or about the 30 day of March, 1905, and subsequently, and on or about the 25th day of October, 1905, the Honorable Secretary of the Interior of the United States, acting through the Honorable Frank Pierce, first assistant secretary, reversed the said decision and ruling of the commissioner of the General Land Office, and directed that said lieu selections, so made as alleged in paragraphs VIII and IX of this amended bill of complaint, together with other selections similarly made, be allowed as of the date on which they were filed, to wit: the 8th day of February, 1904, and directed the Register and Receiver of the United States Land Of-

fice at Lakeview, Oregon, to allow said selections to remain of record as filed.

XVII.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the 6th day of December, 1905, the local officers of the United States Land Office at Lakeview, Oregon, attempted to reject the said lieu selections, so made as alleged in paragraphs VIII and IX of this amended bill of complaint, together with other selections, and alleged as a ground for said attempted rejection that the land covered by said selection had been withdrawn for the purpose of what was known as Kamath River Project, and said action of the said Register and Receiver of the United States Land Office at Lakeview, Oregon, in attempting to reject said selections, was subsequently reversed by order and direction of the Commissioner of the General Land Office, made on the 23rd day of January, 1906, who ordered and directed that said lieu selections be allowed as of date February 8, 1904.

XVIII.

And thereupon your orator further shows unto your Honors:

That on or about the 5th day of March, 1906, and the 11th day of June, 1906, the Register and Receiver of the United States Land Office at Lakeview, Oregon, made objections to the allowance of the said lieu selections, so made as alleged in paragraphs VIII and IX of this amended complaint, together with other

selections, and attempted thereby to reject said lieu selections referred to in paragraphs VIII and IX of this amended complaint, which attempted objections were sustained on appeal by the Commissioner of the General Land Office and by the Department of the Interior, on the 20th day of June, 1906, and subsequently and on or about the 15th day of May, 1907, the Department of the Interior of the United States recalled its attempted decision of June 20, 1906, and entered an order directing the allowance of the said lieu selections, so made as alleged in paragraphs VIII and IX of this amended complaint, together with other selections, as of the date on which said lieu selections were filed, to wit: the 8th day of February, 1904, and ordered and directed that notice of such order be given to all parties who had made entries upon said lands subsequently to the filing of said lieu selections, so made as alleged in paragraphs VIII and IX of this amended complaint, which said notice was duly given as directed.

XIX.

And thereupon your orator further shows unto your Honors:

That subsequently, and as a result of the notice so given, a petition for a review of the departmental decision last referred to was filed on behalf of one Archie Johnson, a claimant of part of the said lands embraced by said indemnity lists 178 and 188, which petition set forth the existence of an alleged conspiracy, averred-to have been formed for the purpose of acquiring all of the said lands, in the first instance,

and that the said lieu selections, so made as aforesaid, were in accordance with, and constituted a part of, said alleged conspiracy, and that the plaintiff herein was not a purchaser in good faith of said land described in paragraph VI of this amended complaint, or any part thereof, which petition for review was allowed, upon the ground that all previous hearings before the Department of the Interior, so had as hereinbefore alleged, were purely ex parte and were, consequently, not proper proceedings in which to determine the merits of the adverse claims to the lands in question, for the purpose of basing a final decision thereon, and therefore, an order was made directing that a final hearing should be held before the Register and Receiver of the United States land office at Lakeview, Oregon, for the purpose of determining the respective merits of various claims to the lands embraced within the said school indemnity lists 178 and 188.

XX.

And thereupon your orator further shows unto your Honors:

That subsequenty, and on or about the 25th day of May, 1908, said hearing so ordered, as aforesaid, was duly and regularly had before the Register and Receiver of the United States land office at Lakeview, Oregon, the plaintiff herein appearing in person and by attorneys, and the defendant and other adverse claimants appearing in person or by attorneys, at which time the said Register and Receiver, after duly hearing the respective parties, attempted to hold that

the various homestead and timber and stone entries hereinbefore referrd to in paragraph XV of this amended complaint and particularly the entry of the defendant which was made on the 23rd day of November, 1906, should be allowed, which decision was subsequently, and on or about the 13 day of April, 1909, reversed by the Honorable Commissioner of the General Land Office, who held that the lieu selections referred to in paragraphs VIII and IX of this amended complaint, together with other selections made in the interest of the plaintiff herein, had been duly and regularly made, and should be allowed to remain intact, upon the records of the United States Land Office, as of the date on which they were filed, to-wit, February 8, 1904.

XXI.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the ..... day of ....., 19....., an appeal from the decision of the Honorable Commissioner of the General Land Office, hereinbefore referred to in paragraph XX of this amended complaint, was taken by certain alleged homestead and timber and stone claimants, including the defendant, to the Department of the Interior of the United States, which department, acting through the Honorable Frank Pierce, its First Assistant Secretary, found that the said lieu selections, so made as alleged in paragraphs VIII and IX of this amended complaint, together with other selections, were filed simultaneously with

the relinquishment and cancellation of said indemnity lists 178 and 188, to wit, on the 8th day of February, 1904, and before the attempted filing of the said alleged homestead and timber and stone entries, so made as alleged in paragraphs X and XV of this amended complaint, and further found that the record then before said department fully showed, and every material fact supported the conclusion, that the plaintiff herein was a purchaser in good faith, free from fraud of any kind, and that the said alleged homestead and other entries, and particularly the entry of the defendant, were made subsequently to the 8th day of February, 1904, and after the filing of the lieu selections, so made as alleged in paragraphs VIII and IX of this amended complaint, and that said lieu selections, so made as alleged in paragraphs VIII and IX of this amended complaint, had been allowed by the Secretary of the Interior, as alleged in paragraphs XVI and XVIII of this amended complaint, and had been allowed by the Commissioner of the General Land Office, as alleged in paragraph XVII of this amended complaint, and, based upon said findings, held that it was within the competency of the officers of the land department of the United States to allow the said alleged homestead and timber and stone entries to be made after the filing of said lieu selections, so made as alleged in paragraphs VIII and IX of this amended complaint, and the allowance of said selections, so made as alleged in paragraphs XVI and XVII and XVIII of this amended complaint, and further held that said lieu selections, so made and allow-

ed, would be denied in all instances where the local officers of the United States Land Office at Lakeview, Oregon, had attempted to allow homestead and timber and stone entries to be made, a copy of which decision is hereunto attached and marked "Exhibit A," and, by reference, incorporated in and made a part of this amended complaint.

XXII.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 6th day of October, 1910, and in accordance with the ruling of the decision hereinbefore referred to in paragraph XX of this amended complaint, a patent to the following described lands, situated in the county of Klamath and State of Oregon, and particularly described as follows, to wit:

> The southwest quarter of the northwest quarter, the northwest quarter of the southwest quarter, section one, and the southeast quarter of the notheast quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian; and the northeast quarter of the southeast quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian;

was issued in the name of Jessie E. Wagner, the defendant herein, contrary to, and in violation of, the rights and equities of the plaintiff herein, and that the said patent so issued, as aforesaid, was issued by the officers of the United States government without re-

gard to, and in contravention of, the vested rights of the plaintiff herein, and in accordance with the ruling of the Department of the Interior, as evidenced by the decision referred to in paragraph XXI of this amended complaint.

XXIII.

And thereupon your orator further shows unto your Honors:

That this is a suit between citizens of different states, and that the amount in controversy herein exceeds the amount of three thousand ($3000) dollars, exclusive of interest and costs.

XXIV.

And thereupon your orator further shows unto your Honors:

That he has no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, and foreasmuch as your orator is remediless in the premises, under and by strict rules of common law, and can only have relief in a court of equity where matters of this nature are recognizable and reviewable, files this, his amended bill of complaint, and prays:

I. That the defendant may be adjudged and decreed to hold said lands described in paragraph VI in trust for your orator, and to convey the same to your orator, and deliver to your orator any patent or other deeds of the same in her possession, and be restrained and enjoined from hereafter setting up any claim or title to said lands or any part thereof, or in any manner intermeddling therewith, or removing any tim-

ber or other product therefrom.

II. That the defendant may be adjudged and decreed to hold any timber or other product by her or her servants or agents removed from said land, or the proceeds or manufactured product from the same, in trust for your orator, and may be decreed to account to your orator for the same, or the value thereof, and to repay to your orator said value, with interest from the date of sale, if the same has been sold by the said defendant.

III. That upon the failure of the defendant to make said conveyance and to deliver to your orator any patent or other deeds of the said lands described in said paragraph VI, within a period of thirty days from the entry of the decree of this court, the said decree be adjudged and decreed to stand as a conveyance in lieu of such patent or other deeds.

IV. And your orator further prays: That your Honors may grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this Honorable Court, directed to the defendant, Jessie E. Wagner, therein and thereby commanding said defendant, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer, all and singular, (but not under oath, answer under oath being expressly waived), the matters and things aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

V. And your orator prays for such further relief in the premises as the nature and circumstances of this cause may require and to your Honorable Court may seem reasonable and proper.

And your orator, as in duty bound, will ever pray.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, His Solicitors.

Hugh Montgomery,

of Counsel.

[Exhibit "A"]

D. C. M. G. B. G.

DEPARTMENT OF INTERIOR.

Washington, Feb. 17, 1910.

E--900.

Aztec Land & Cattle Company, Lt'd.

E. B. Perrin

Lieu Selectors,

A. D. Daniels,

Claimant of Beneficial Interest,

vs.

Archie Johnson, et al,

Intervenors.

The Commissioner

Of the General Land Office.

Sir:

This is the appeal of Archie Johnson, et al., intervenors, from your office decision of April 13, 1909, sustaining the claim of A. D. Daniels, beneficiary under Lieu Selections, Nos. 15016, 15017 and 18, (Serials 0714, 0715, 0716) for certain described lands in the Lakeview Land District, Oregon. Questions affecting the validity of these selections have been subject of numerous decisions of the Land Department, and a detail statement of such proceedings covering a period of more than eight years, must of necessity be set out

in detail, if the issues now presented may be properly understood.

January 28, 1902, the lands involved were selected by the State of Oregon, per school indemnity lists Nos. 178 and 188 these lists were held for cancellation by your office, because of invalid base, and were finally cancelled in March and August, 1904, upon relinquishments filed on behalf of the state. The date of the filing of these relinquishments is one of the disputed questions in this record: and while not necessarily controlling, it is in view of this case important, and will be considered on its merits in the progress of this paper.

For present statement, it will be enough to say that the local officers and your office have found that it was filed Feb. 10, 1904, whereas it is claimed on behalf of A. D. Daniels, owner of the Beneficial interest in certain Forest Lieu Selections of these same lands, that it was filed Feb. 8, 1904. However this may be, the Forest Lieu Selections in question were filed on said last named date Feb. 8, 1904, but were rejected by the local officers in a letter to one, L. T. Barin, March 4, 1904, for conflict with certain homestead and timber and stone applications for part of the same lands, These Forest Lieu Selections were filed by Barin in the name of Edward B. Perrin, and Aztec Land and Cattle Co. but the said A. D. Daniels was the beneficial owner of the scrip, which was filed in his interests to protect his purchase from the state under its aforesaid Invalid Indemnity Selections.

On appeal, your office affirmed the action of the

Register and Receiver, giving as further reason and justification thereof the fact, that the Lieu Selections were presented at the local land office prior to cancellation of said Indemnity School Selections, and even prior to the filing of the state's relinquishment. Upon appeal, however, from this action of your office, the Department, Oct. 25, 1905, reversed your office decision, stating while the appeal was pending an affidavit had been filed by A. D. Daniels in which he stated that he was the real party in interest and the equitable owner of the lands assigned as bases for the Lieu Selections; that after its selections of the lands as School Indemnity, the State of Oregon had sold them to sundry purchasers, who paid part of the purchase price and assigned the certificates of sale to him, and he was then the owner thereof; that he thereafter became doubtful as to the validity of the State selection, and in order to protect his interests obtained relinquishments from the State and caused them to be filed in the Local Land Office at Lakeview with Lieu Selections; that in so doing he relied upon your office report of Oct. 13, 1904, (1903) to the Secretary of the Interior; which report was transmitted by the Department to the Governor of Oregon Oct. 17, 1904 (1903).

Considering the appeal, the Department held that the case, was controlled by its decision in the California and Oregon Land Company, (33 L. D. 595), that this case was in all essential respects the same as that one, and remanded the case with directions to adjudicate it thereunder. The Lieu Selections having

been returned to the Register and Receiver for allowance in accordance with said decisions, they were again, on Dec. 6, 1905, rejected by the local officers, for the reason that the lands had been withdrawn by telegram of June 25, 1904, for the Klamath River project. This action of the Register and Receiver was reversed by your officer Jan. 23, 1906, and the selections were remanded to be entered of record as of date Feb. 8, 1904, the day on which they were originally presented, if no other objection appeared. Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office upon the said applications; and stated there were objections to the allowance of the same, in that there were various homesteads and timber and stone applications which had been allowed subsequently to the cancellation of the state's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

Separate appeals were taken by the Aztec Land and Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

Upon sonsideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels, was entitled to protection as a Bona Fide purchaser from the

state; that the State's selections were filed Jan. 28, 1902, while the lands were sold on Jan. 21st, preceding, at which they were public lands of the United States, and no one purchasing them could claim to be a Bona Fide purchaser from the State; that as late as Oct. 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a Bona Fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed: and if had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a Bona Fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the General land laws; that to conceed to him this privilege under letters Oct. 17 & 13, 1903, mentioned above, would in effect, be to make such persons as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's list invalid for want of sufficient base; the filing of the State's relinquishment, and the protection of the purchaser from the state by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

A motion for review of said decision of June 26th, 1906, having been filed by Daniels, Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels, was not, strictly speaking a Bona Fide purchaser from the State, because the Certificates of sale issued by the State antedated the filing of the School Indemnity Selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a Bona Fide Purchase.

The decision of June 26th, 1906, was therefore recalled, and it was ordered that the Lieu Selection should be reinstated.

In promulgating the decision last mentioned, your office returned the Lieu Selections to the Local Land Office for allowance, and instructed the Register and Receiver to notify all parties who had made entry of said lands subsequently to the cancellation of the State's list to show cause within sixty days why their entries should not be cancelled, because of conflict with said Lieu Selections as a result of which a petition termed, a motion for re-review of Departmental decisions of May 15, and 18, 1907, was filed on behalf of Archie. Johnson who claimed a part of the Lands under a sale made thereof under the Public Land Laws.

This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved: that the entire proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the public land laws.

Considering this petition, the Department stated in its decision of August 10th, 1907, that its previous decisions had been ex parte, and that the last decision favorable to Daniels did not prevent your office ordering a hearing, or taking other action with respect to the disposition of the claims of others which might be materially affected by the re-instatement of the claim of Daniels; and the case was accordingly remanded to your office for further consideration, to the end that a full and thorough investigation might be made into the matter, and your office was expressly advised that the previous decisions of the Land Department should in no wise embarass your action in the premises.

A hearing was accordingly ordered; and after due notice to all parties concerned, that the same was had before the local land office, May 25, 1908, Daniels appearing in person and by attorney, and the other parties claiming an interest either in person or by an attorney. The Local Land Office found that the case was not similar in all respects to that of the California and Oregon Land Company cited above; that in

that case there were no intervening rights or equities of other parties, while in the case under consideration the lands had been entered by bona fide settlers or purchasers, to many of whom final certificates had issued and in some instances even Patents had been issued.

The Register and Receiver accordingly recommended that the Homestead and Timber and Stone Entries of the various parties in the case should be allowed to remain in tact. Daniels appealed to your office, whereby your said decision of April 13, 1909, the action of the Local Office was reversed, and it was held that the Lieu Selections should remain in tact.

An appeal on behalf of the Homestead and Timber and Stone claimants brings the case before the Department. Most of the applicants to purchase the lands from the State upon whose supposed initiative these selections were made were not persons in being, but were fictitious persons, usually designated as "Dummies."

But while this is so, there is no evidence in this record showing or tending to show, that Daniels, or any person in privity with him, in fact, was a party to or had any knowledge of the intended fraud; and every material fact in this record supports the conclusion that Daniels bought in good faith, the Certificates of sale issued by the State. He had never heard of these State's Selections until one McHale, a timber land speculator of whom he had no personal acquaintance, but who was known to him by reputation, had reported to him that there was a large body of timber

land for sale, at Klamath, Oregon; and upon McHale's representations, he constituted McHale his agent under powers which amounted to, co-partnership, and McHale went to Klamath Falls to fully investigate these lands and the title thereto. McHale had instructions from Daniels, among other things, to secure the services of an attorney upon the question of title.

He did so. The attorney after an examination of the certificates of sale, reported that the title was good, and McHale's inquiries into the character of the land being satisfactory the results of his investigations was reported to Daniels and the deal was closed, upon the payment by Daniels of $23,901.10 for the certificates, of sale, and the further payment to the State of the unpaid ballance of the purchase price thereon, amounting to $3,033.74. Daniels had no personal acquaintance with any of the parties to the transactions; and so far as it appears from this record, he had no knowledge, information or belief which should have caused him to question the bona fides, of the people with whom he was dealing, or cause him to suspect that there was irregularity in the transaction. Nor was there anything in his connection with subsequent events, in his efforts to acquire title to these lands which may reasonably be said to go to the good faith of his purchase. It appears that rumors were soon thereafter rife with reference to land frauds in Oregon in connection with its school land grant.

The rumors reached Daniels and he promptly investigated them, finding for the first time that his title was questionable, upon the advice of his attorney, he initiated a contest against the State's selections upon which his title rested, hoping thereby to protect his purchase by acquiring an equitable preference right.

As a result of this contest, the state refunded the money which he had paid it and put in the hands of his attorney a relinquishment to the United States of all rights under its selections. Daniels then caused said relinquishments to be filed in the District Land Office, together with the Lieu Selections. There was certainly nothing reprehensible in this proceeding. Moreover, it was taken upon certain suggestions made in your said report of October 13, 1903. This report was responsive to a letter from the Governor of Oregon, September 28, 1903, wherein the inquiry was made of this department as to the means of protecting bona fide purchasers of the school indemnity lands from the State in instances where the State's selections had been cancelled for invalid base. Your offices reported among other things, and this is the same report transmitted to the Governor of Oregon, Oct. 13, 1903, that as to such selections—

while the selection is of record and uncancelled, the land is segregated thereby, and no right can be acquired by the presentation of an applicaiton therefor (29 L. D. 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure right of entry.

This is also the plain holding of this Department in the
in California and Oregon Land Company, supra, and is precisely the course pursued by Daniels in this case. His contest against the State's selection was to that end. He secured the State's relinquishments and presented them with the aforesaid applications to scrip the land.

It is true the record shows that the relinquishments were not marked, filed, in the local office until Feb. 10, 1904, which was two days after the presentation of the scrip applications.

It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been receved on February 8, instead of February 10, the filing would have been noted on the day they were received.

But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

The filing was by mail, and the letter of transmittal was written by Daniel's attorney, the said L. T. Barrin.

The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered

scrip applications, is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

It is worthy of too, that there has not been found any correspondence or record which would indicate that if the said Barin, had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

I conclude therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be, in your office report of September 28th, 1903, above quoted.

Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This however, it has been seen, was not done.

The scrip applications were rejected, and the history of the case, hereinbefore set out, shows that these applications were kept alive by successive appeals,

and that the case was twice remanded to the local officers, with directions to allow the applications, but various reasons were assigned for the neglect or failure of the local officers to obey these instructions.

It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries for most of these lands. It is thought however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See Hoyt vs. Weyerhauser et al). (161 F. E. D., Rep., 324).

It appears however, from your office reports of Dec. 16, 1909, that there are approximately 107 quarter Sections of land involved in this case. Of these, twenty-eight are involved in homestead entries, four

in cash entries and homestead entries, twenty-four in cash entries, twenty-five in Timber and Stone sworn statements, twelve are free and unappropriated, eight of them do not appear to be covered by the Lieu Selections in question, and seven of them have been patented.

In view of what has been said, the claim of Daniels must be denied as to all of them except those covered by Timber and Stone sworn statements only, and those that are unappropriated, amounting to what seems to be, from your office reports, approximately thirty-seven quarter sections in all.

As to these lands, the Timber and Stone applicants have not put themselves in privity with the United States, and the Land Department has not entered in to such Contract with them as to preclude other disposition of the lands.

See Campbell vs. Weyerhauser et al (161 Fed. Rep., 332).

This being true, and believing that the equities of Daniels should be protected to the fullest extent consistent with equitable administration, I have to direct that the Scrip applications be allowed as to all tracts which have not been otherwise disposed of, and rejected as to such as now appear to be covered by Homestead and cash entries.

The decision appeal from is modified. The papers are herewith returned.

Very respectfully,

FRANK PIERCE,

First Assistant Secretary.

Enclosures.

[Endorsed]: Amended Bill in Equity. Filed Mar. 28, 1912.

A. M. CANNON,
Clerk U. S. Dist. Court.

And afterwards, to wit, on the 29 day of April, 1912, there was duly filed in said Court, a Demurrer, in words and figures as follows, to wit:

[Demurrer to Amended Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JESSIE E. WAGNER,

Defendant.

DEMURRER.

Comes now the defendant in the above entitled SUIT and DEMURS to the AMENDED COMPLAINT of the plaintiff filed herein, and for ground of DEMURRER, respectfully shows to this HONORABLE COURT that it appears upon the face of the said AMENDED COMPLAINT:

I.

That this COURT is without jurisdiction to review the decision of the General Land Office of the United States, in accepting final proof and and payment, and the issuing to Jessie E. Wagner, defendant herein, a Patent to the lands involved and described in said AMENDED COMPLAINT.

II.

That this COURT is without jurisdiction to review the decision of the General Land Office of the United States in accepting the payment and final proof of defendant herein, after due notice as provided by Act of Congress, dated June 3, 1878, and without protest on the part of this plaintiff.

III.

That this COURT is without jurisdiction, since the United States is not made a party plaintiff.

IV.

That there are no allegations in said AMENDED COMPLAINT of fraud on the part of defendant in acquiring the Patent to the lands involved and described in plaintiff's AMENDED COMPLAINT.

V.

That there is no EQUITY in the AMENDED COMPLAINT of the Plaintiff:

VI.

That the allegations stated in plaintiff's AMENDED COMPLAINT are not sufficient in LAW to constitute a cause of SUIT in EQUITY.

F. H. MILLS,
Attorney for Defendant.

STATE OF OREGON,
County of Klamath—ss.

I, F. H. MILLS, Attorney for Defendant, in the foregoing DEMURRER do hereby certify, that I have prepared the same to plaintiff's AMENDED COMPLAINT: that it is my opinion, and I verily believe that the DEMURRER IS WELL FOUND-

ED IN LAW.

Dated, April 26, A. D., 1912.

F. H. MILLS.

[Endorsed]: Demurrer. Filed Apl. 29, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Saturday, the 14 day of September, 1912, the same being the 65 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the follow proceedings were had in said cause, to-wit:

[Decree.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JESSIE E. WAGNER,

Defendant.

This cause having come on regularly to be heard by the Court upon the demurrer of the defendant to the amended bill of complaint of the above named plaintiff, and the defendant having appeared by her attorney, F. H. Miils, and the plaintiff having appeared by his attorneys, Messrs. Platt & Platt and Hugh Montgomery, and the Court having heard the arguments of counsel for the respective parties hereto, and having taken the said cause under advisement, and being now fully advised in the premises, and it appearing to

the Court that said demurrer is well taken and should be in all respects sustained, and that said amended bill of complaint is without equity, and should be dismissed.

IT IS THEREFORE ORDERED, CONSIDERED, ADJUDGED, AND DECREED by the Court that the said demurrer to said amended bill of complaint be, and the same is hereby, in all respects sustained, and that said amended bill of complaint be, and the same is hereby, dismissed, and that said defendant have and recover of and from said plaintiff her costs and disbursements herein, taxed at $.....

And afterwards, to wit, on the 25 day of September, 1912, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JESSIE E. WAGNER,

Defendant

The above named plaintiff conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the 14th day of September, 1912, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons speci-

fied in the Assignment of Errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, upon his filing a bond for the payment of all damages and costs if he fails to prosecute the said appeal to effect which bond shall act as a supersedeas bond.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, Solicitors for Plaintiff.

Hugh Montgomery,

of Counsel.

[Endorsed]: Petition for Appeal. Filed Sept. 25, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 25 day of September, 1912, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JESSIE E. WAGNER,

Defendant.

Now, on this 25th day of September, 1912, comes the above named plaintiff, A. D. Daniels, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record, and says, that in the record and proceedings of the above entitled court in the above entitled cause and in the final order and decree entered thereon on the 14th day of September, 1912, there is manifest error, and that said order and decree is erroneous and against the just rights of said plaintiff and for error the said plaintiff assigns the following:

I.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff, on the 8th day of April, 1904, made a valid forest lieu selection of the lands described in paragraph VI of plaintiff's amended bill filed in said cause under and in accordance with the provisions of the act of Congress of June 4th, 1897, set forth in paragraph VII of plaintiff's amended bill of complaint.

II.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the forest lieu selection of the plaintiff made upon the lands described in paragraph VI of his amended bill of complaint was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever and particularly the defendant.

III.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the attempted timber and stone entry of the defendant was subsequent in time and inferior in right to the forest lieu selection of the plaintiff.

IV.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the forest lieu selections of the plaintiff had been approved by the proper officers of the United States Government which approval gave the plaintiff a vested interest in the land so selected.

V.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the alleged timber and stone entry of the defendant was made in contravention of the vested rights of the plaintiff herein.

VI.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff was equitably entitled to be protected in the forest lieu selections which he had made on the lands described in paragraph VI of his amended bill of complaint, as against the claims of the defendant or any person or persons whomsoever.

VII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff was equitably entitled to have the defendant declared a trustee for the plaintiff of the lands described in paragraph VI of his amended bill of complaint.

VIII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that the said amended bill of complaint stated a good cause of action to which the defendant should be required to file her answer or plea.

IX.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendant.

WHEREFORE, the plaintiff and appellant prays that the decree of said court be reversed and such directions be given that full force and efficacy may enure to the plaintiff by reason of the cause of suit set up in his amended bill of complaint filed in said cause, and that a decree be entered in accordance with the prayer of plaintiff's amended bill of complaint.

PLATT & PLATT and HUGH MONTGOMERY
Solicitors for Plaintiff.

Hugh Montgomery,
of Counsel.

[Endorsed]: Assignment of Errors. Filed Sept. 25, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 25 day of September, 1912, there was duly filed in said Court, an Order Allowing Appeal, in words and figures as follows, to wit:

[Order Allowing Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JESSIE E. WAGNER,

Defendant.

This day came A. D. Daniels, plaintiff, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record and presented his petition for an appeal and an assignment of errors accompanying the same which petition, upon consideration of the court, is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the filing of a bond in the sum of $500 with good and sufficient surety to be approved by the court; and

It is further ordered that said bond shall act as a supersedeas bond, and

It is further ordered that a certified transcript of the record, and all proceedings herein be forthwith

transmitted to the said United States Circuit Court of Appeals.

R. S. BEAN,

Dated this 25th day of September, 1912.

[Endorsed]: Order Allowing Appeal. Filed Sept. 25, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 25 day of September, 1912, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JESSIE E. WAGNER,

Defendant.

KNOW ALL MEN BY THESE PRESENTS:

That we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Jessie E. Wagner, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Jessie E. Wagner, her executors, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals this 25th day of September, A. D., 1912.

WHEREAS, lately at the District Court of the United States for the District of Oregon, in a suit pending in said court between A. D. Daniels, plaintiff, and Jessie E. Wagner, defendant, a decree was rendered against said plaintiff, A. D. Daniels, and said A. D. Daniels having petitioned an appeal and filed a copy thereof in the clerk's office in said court to reverse the same in the aforesaid suit, and a citation directed to the said Jessie E. Wagner citing and admonishing her to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the City of San Francisco in said Circuit, on the 25th day of October, A. D., 1912, having been served on said defendant;

NOW the condition of this obligation is such, that if the said A. D. Daniels shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

A. D. DANIELS,

By Platt & Platt, his Solicitors of Record.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

[Seal.] By W. J. Clemens,

Agent.

By Harrison G. Platt, Attorneys in Fact.

Examined and approved this 25th day of September, 1912.

R. S. BEAN,

District Judge.

[Endorsed]: Bond on Appeal. Filed Sept. 25, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 25 day of September, 1912, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

A. D. DANIELS,

Appellant,

vs.

JESSIE E. WAGNER,

Appellee.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit—ss.

TO JESSIE E. WAGNER, GREETING:

WHEREAS, A. D. Daniels, appellant in the above entitled suit has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the District of Oregon, made in favor of you, the said Jessie E. Wagner, and has filed the security required by law; you are therefore hereby cited to appear before the said United States Circuit Court of Appeals at the City of San Francisco, State of California, on the 25th day of October, next, to do and receive what may pertain to

justice to be done in the premises.

Given under my hand at the City of Portland in the Ninth Judicial Circuit this 25th day of September, in the year of our Lord, one thousand nine hundred twelve.

R. S. BEAN,
Judge of the District Court of the United States.

UNITED STATES OF AMERICA,
District of Oregon—ss.

Due service of the within Citation to Appellee by certified copy thereof as required by law, is hereby acknowledged at Portland, Oregon, this 25th day of September, 1912.

F. H. MILLS,
of Attorneys for Appellee.

[Endorsed]: Citation to Appellee. Filed Oct. 5, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Saturday, the 28 day of September, 1912, the same being the 77 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JESSIE E. WAGNER,

No. 3712.

September 28, 1912.

Now, at this day, for good cause shown, It is ORDERED that the plaintiff's time for filing and docketing the record on appeal in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended ninety (90) days from this date.

R. S. BEAN,
Judge.

No. 2217

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

A. D. DANIELS,

Appellant,

vs.

JESSIE E. WAGNER,

Appellee.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

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proceedings were had in the Land Department, concerning the land so entered, and on August 10, 1907, the Secretary of the Interior instructed the Commissioner to order a hearing, that a full investigation might be had of the whole matter; that upon the hearing the local land office found that the lands had been entered by *bona fide* settlers or purchasers, to many of whom certificates, and in some instances, patents had issued; that the Register and Receiver accordingly recommended that such entries be allowed to remain, and the Secretary of the Interior finally so decided on February 17, 1910, holding that the greater equities were with the Homestead and Stone and Timber entrymen, and that in the discretion of the Secretary, such entries might be protected against the right of the scrip applications, and said: "It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons, and having done so, Daniels will not now be heard to question the correctness of that disposition."

GILBERT, Circuit Judge, after stating the case:

The appellant contends that by virtue of his offer to select the lands in question, and the tender in exchange therefor of a deed and abstract of title to the lands offered for surrender, he thereby became the equitable owner of the lands so sought to be selected, notwithstanding that his selection was rejected by the officers of the local land office, and that their rejection was affirmed by the Secretary of the Interior,

and that the patent having issued to the appellees, when in equity and good conscience, and according to law, it should have gone to the appellant, the Court should convert the holder of the legal title into a trustee for the appellant, and compel conveyance of the legal title to him.

In considering, in the light of the adjudications, the question here presented, it is essential to bear in mind the distinction between the right acquired by a Railroad Company, under a congressional grant of lands to aid the construction of a railroad, to select within the indemnity limits lands in lieu of those which are lost in the place limits, and the right of a lieu land selector under the Act of June 4, 1897. The former is a substantial right in the lands lying in the indemnity limits, given in consideration of the construction of a railroad, and is confined to specific lands within certain boundaries which are defined in the grant. It is a vested right, of which the grantee could not be deprived, by an Act of Congress or by other authority. In Weyerhaeuser vs. Hoyt, 219 U. S. 387, the Court declared that it was the intention of Congress in making such a grant, "to confer a substantial right to land within the indemnity limits in lieu of land lost within the place limits." The right of selection of lieu land given under the Act of June 4, 1897, however, is in the first instance but an offer by the Government to exchange lands. It is based upon no valuable consideration actually received. It attaches to no specific lands, nor to lands within any defined limits. It does not attach upon the mere presentation of the requisite papers. It at-

taches only when the authorized officers of the Government accept the offer to exchange. Nor is it true that the filing of the lieu selection papers and the acceptance of the same by the local Land Office segregates the land upon which the filing is made so as to cut off intervening and subsequent rights as against the lieu selectors. In Roughton vs. Knight, 219 U. S. 537–547, in construing the Act of June 4, 1897, the Court said: "Manifestly there must be an acceptance of the relinquishment by someone authorized to decide upon its sufficiency, and an assent to the particular selection made in lieu." In Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S. 310, lieu land had been selected under the Act of June 4, 1897. The selector complied with the provisions of the Act. His selection was received and accepted, and entered on the records of the local land office. At that time there was no adverse claim. Before the issuance of a patent, the selector's grantee brought a suit against the defendants, who had entered the land as a mineral claim, he claiming that his grantor had become vested with the complete equitable title to the land so selected, and had become entitled to receive a patent. The Court held that it had no jurisdiction prior to the issuance of the patent to determine who was entitled to receive it, and that under the Act of June 4, 1897, the officers of the local land office had no authority to decide whether the selector had complied with the provisions of the Act, that authority being vested in the Commissioner of the General Land Office. The Court said: "But even the complete equitable title asserted by a complainant must,

as it would seem, be based upon the alleged right of the local land officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action of the local officers. There must be a decision made somewhere regarding the rights asserted by the selector of land under the Act before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute, and the selector cannot decide the question for himself. We do not see how it can be successfully maintained that without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land, and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land." It is urged that this language of the Court is *dictum*, but we do not so regard it. It contains the reasoning of the Court in determining the nature of the rights of the complainant in that case. But if, indeed, it is true that the expression of such views was unnecessary to the determination of the case which was before the Court, the language used sets forth the mature and unanimous judgment of the members of that court on the question of law which is involved in the case at bar, and we deem it controlling in the decision of the present case.

Nor do we find ground to sustain the appellant's contention that the views of the Court so expressed

in the Cosmos Exploration Company case have been modified by the decision in Weyerhaeuser vs. Hoyt, 219 U. S. 380. That was a case which involved the right of a railroad company to select lands within the indemnity limits of its grant. The Court held that selections of lieu lands filed with the Secretary of the Interior excluded the right of others to appropriate the lands embraced therein pending action by the Secretary, and that the railroad company's rights to such lieu lands so selected were superior to those of a purchaser under the Timber and Stone Act who filed pending final decision by the Secretary, and that the final decision by the Secretary related back to the date of the original selections. Prior to that time, the Court had said, in New Orleans Pacific Ry. Co. vs. Parker, 143 U. S. 57: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior." The same was held in Humbird vs. Avery, 195 U. S. 507. In Wisconsin Central Ry. Co. vs. Price County, 133 U. S. 496, 512, the Court said: "Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title"; and in Sjoli vs. Dreschel, 199 U. S. 565, the Court held it to be established doctrine "that no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within indem-

nity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and, That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road." In the Weyerhaeuser case, the Court distinguished the Sjoli case by saying that it belonged to a class of cases in which there was no question of right by relation involved, and that the general language which we have quoted from the opinion was to be considered in view of the questions which were presented in that case, and that to apply it in the Weyerhaeuser case would be in effect to destroy the indemnity provisions of the Granting Act. No reference was made to the decision in the Cosmos Exploration Company case, and this was evidently for the reason that the language of the Court in that case was deemed to be applicable solely to the right of selection granted by the Act of June 4, 1897, and that the Court recognized and intended to reaffirm the vital distinction which it had found between such rights and the rights of a selector of indemnity lands under a grant to a railway company in aid of the construction of its road. Stalker vs. Oregon Short Line, 225 U. S. 142, is in line with Weyerhaeuser vs. Hoyt and so is Svor vs. Morris, 227 U. S. 524. We consider the decision in the Cosmos Exploration Company case authority for sustaining the decree of the

court below. But there is additional ground for sustaining it in the fact that, at the time when the appellant's selection was initiated on February 8, 1904, the lands involved herein appeared upon the records of the local land office as selected by the State of Oregon by certain school indemnity lists, and that those lists were not relinquished by the state until February 10, 1904. This sufficiently appears from the decision of the Secretary of the Interior, which is made an exhibit to the bill and is controlling in so far as it varies from the allegations of the bill. Greenameyer vs. Coate, 212 U. S. 434, 443.

The decree in each of the sixteen suits, Nos. 2212–2227, is affirmed.

[Endorsed]: Filed May 5, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2217.

A. D. DANIELS,

Appellant,

vs.

JESSIE E. WAGNER,

Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the District of Oregon, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellant. It is further ordered, adjudged and decreed by this Court that the appellee recover against the appellant for her costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered May 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Petition for Allowance of Appeal to Supreme Court of the United States.

PETITION FOR APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

The above-mentioned appellant, A. D. Daniels, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a decree has therein been rendered, on the fifth day of May, A. D. 1913, affirming the decree of the District Court of the United States for the District of Oregon, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs; that this cause is one involving the construction and application of a stat-

ute of the United States, to wit, Act of June 4, 1897, 30 Statutes at Large, 36 (U. S. Comp. Stats. 1901, p. 1541), and in which the decree of the United States Circuit Court of Appeals for the Ninth Circuit is not final, and is a proper cause to be appealed to the Supreme Court of the United States.

The above-named appellant, conceiving himself aggrieved by the decree made and entered in the above-entitled court and cause on the fifth day of May, 1913, does hereby appeal from said decree to the United States Supreme Court, for the reasons specified in the assignment of errors, which is filed herewith.

WHEREFORE, the said appellant prays that an appeal be allowed him in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors, herewith filed by the said appellant, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

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[Title of Court and Cause.]

Assignment of Errors on Appeal to Supreme Court of the United States.

COMES NOW the appellant, A. D. Daniels, by Platt & Platt, his solicitors, and says that in the record and proceedings herein there is manifest error, and assigns error thereto as follows:

The United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the decree of the United States District Court for the District of Oregon sustaining the demurrer of appellee to appellant's amended bill of complaint, and dismissing appellant's amended bill of complaint:

First. Because the demurrer to appellant's amended bill of complaint admits that on the 8th day of February, 1904, the appellant made a valid forest lieu selection of the land, described in paragraph VI of appellant's amended bill filed in said cause, under and in accordance with the provision of the Act of Congress of June 4, 1897, set forth in paragraph VII of appellant's amended bill of complaint.

Second. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selection of appellant, made upon the lands described in paragraph VI of his amended bill of complaint, was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly to that of the appellee.

Third. Because the demurrer to appellant's amended bill of complaint admits that the attempted timber and stone entry of the appellee was subsequent

in time and inferior in right to the forest lieu selection of appellant.

Fourth. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selections of appellant had been approved by the proper officers of the United States Government, which approval gave appellant a vested interest in the land so selected.

Fifth. Because the demurrer to appellant's amended bill of complaint admits that the alleged timber and stone entry of the appellee was made in contravention of the vested rights of the appellant herein to the land described in paragraph VI of appellant's amended bill of complaint.

Sixth. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to be protected in the forest lieu selection which he had made on the lands described in paragraph VI of his amended bill of complaint as against the claims of the appellee, or any person or persons whatsoever.

Seventh. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to have the appellee declared a trustee, for the appellant, of the lands described in paragraph VI of appellant's amended bill of complaint.

Eighth. Because the demurrer to appellant's amended bill of complaint admits that the Oregon school indemnity lists, covering the lands described in paragraph VI of appellant's amended bill of complaint, were relinquished simultaneously with the

filing of the forest lieu selections by appellant.

Ninth. Because the demurrer to appellant's amended bill of complaint admits that the relinquishments of the Oregon school indemnity lists were filed on February 8, 1904.

Tenth. Because the appellant's amended bill of complaint stated a good cause of suit to which the appellee should have been required to file her answer or plea.

Eleventh. Because the decree of said District Court should have been reversed and the demurrer to appellant's amended bill of complaint overruled.

WHEREFORE, the appellant prays that the decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed, and such directions be given that force and efficacy may inure to the appellant by reason of the cause of suit set up in his amended bill of complaint filed in said cause, and that a decree be entered in accordance with the prayer of appellant's amended bill of complaint.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond.

IT IS HEREBY ORDERED, that the appeal in the above-entitled case to the Supreme Court of the

United States be, and the same is hereby, allowed as prayed.

AND IT IS FURTHER ORDERED that the amount of the appeal and supersedeas bond be, and the same hereby is, fixed at $500.00.

Dated this 3d day of June, 1913.

WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Bond on Appeal to Supreme Court U. S.

KNOW ALL MEN BY THESE PRESENTS, that we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Jessie E. Wagner in the full and just sum of Five Hundred Dollars ($500.00), lawful money of the United States of America, to be paid to the said Jessie E. Wagner, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals this 3d day of June, 1913.

WHEREAS, the appellant in the above-entitled suit is prosecuting an appeal to the United States Supreme Court to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Ninth Circuit on the 5th day of May, 1913;

NOW, THEREFORE, the condition of this obligation is such, that if the said appellant shall prosecute said appeal to effect, and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

A. D. DANIELS. [Seal]
By PLATT & PLATT,
His Solicitors of Record.

FIDELITY & DEPOSIT CO. OF MARYLAND, [Seal]
By ROBERT T. PLATT,
Attorney in Fact.
CHESTER W. HANSEN,
Agent.

Examined and approved this 3d day of June, 1913.
WM. B. GILBERT,
Circuit Judge for the Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Praecipe for Record on Appeal to Supreme Court of the United States.

To the Clerk of the said Court:

Sir: Please issue a certified Transcript of the Record on appeal to the Supreme Court of the United States in the above-entitled cause, consisting of the following:

1. Copy of Printed Transcript of Record on which case was heard in the Circuit Court of Ap-

peals, to which will be added a Copy of the following-entitled papers that were filed, and of the Proceedings that were had in said Circuit Court of Appeals, viz.:

2. Order of Submission;
3. Opinion;
4. Decree;
5. Petition for Appeal to Supreme Court U. S. and Order thereon.
6. Bond on Appeal to Supreme Court U. S.
7. Assignment of Errors;
8. Praecipe for Certified Transcript of Record on Appeal to Supreme Court U. S.;
9. Certificate of Clerk U. S. C. C. A. to Transcript of Record on Appeal to Supreme Court U. S., and
10. Original Citation on Appeal to Supreme Court U. S.

PLATT & PLATT,
Solicitors for Appellant.

United States of America,
Ninth Judicial Circuit,—ss.

Due service of the within Praecipe for Transcript on Appeal to Supreme Court U. S. is hereby acknowledged, and certified copy thereof received at Klamath Falls, Oregon, this 10th day of June, 1913.

F. H. MILLS,
Of Solicitors for Appellee.

[Endorsed]: Filed Jun. 12, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2217.

A. D. DANIELS,

Appellant,

vs.

JESSIE E. WAGNER,

Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-five (95) pages, numbered from and including one (1) to and including ninety-five (95), to be a full, true and correct copy of the complete record in the above-entitled cause, prepared pursuant to praecipe therefor filed by counsel for the appellant, including all proceedings had therein, and including the Opinion and the Assignment of Errors filed therein, as the same remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record in said cause on Appeal to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this twentieth day of June, A. D. 1913.

[Seal] F. D. MONCKTON,

Clerk.

[Endorsed on Cover.]

File No. 23,820.

U. S. Circuit Court Appeals, 9th Circuit.

Term No. 669.

A. D. DANIELS, Appellant,
vs.
JESSIE E. WAGNER.

Filed August 2d, 1913.

File No. 23,820.

DANIELS *v.* WAGNER.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 239. Argued April 21, 1915.—Decided June 1, 1915.

Under the Forest Act of June 4, 1897, c. 2, 30 Stat. 36, one whose land was included in a forest reserve had the right to apply to the Land Office, and, on surrendering his land, to obtain the right to enter an equal amount of public lands on offering to do all that the law and lawful regulations of the Land Department required.

The fact that an officer of the Land Department commits a wrong by denying to an individual a right expressly conferred by law cannot become the generating source of a discretionary power to make such wrongful act legal. *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, distinguished.

One who has done everything essential, exacted either by law or the lawful regulations of the Land Department, to obtain a right from the Land Office conferred upon him by Congress, cannot be deprived of that right either by the exercise of discretion or by a wrong committed by the Land Officers.

Error of law having been committed by the Land Department in assuming that it had a discretionary power to reject a lieu entry made under the Forest Act of June 4, 1897, by one who had offered to comply with the statute and lawful regulations of the Department, its action is not sustainable, upon general equitable considerations, such as were made the basis for refusing to issue certificates in this case.

Because a patent of the United States is involved, does not necessarily require the United States to be a party to an action to determine to whom it should have been issued.

205 Fed. Rep. 235, reversed.

THE facts, which involve the construction of certain provisions of the laws of the United States relating to the public lands, are stated in the opinion.

Mr. Harrison G. Platt, with whom *Mr. Robert Treat Platt* and *Mr. Hugh Montgomery* were on the brief, for appellant.

Mr. J. H. Carnahan, with whom *Mr. F. H. Mills* was on the brief, for appellee:

No vested right is acquired by the mere offer to file a forest lieu selection which is rejected. *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301; *Pacific Land Co.* v. *Elwood Co.*, 190 U. S. 314; *Roughton* v. *Knight*, 219 U. S. 536; *United States* v. *McClure*, 174 Fed. Rep. 510; *Clearwater Timber Co.* v. *Shoshone Co.*, 155 Fed. Rep. 612; *Osborn* v. *Forsyth*, 216 U. S. 570; *Pacific Stock Co.* v. *Isaacs*, 96 Pac. Rep. (Ore.) 464; *Robinson* v. *Lundrigan*, 178 Fed. Rep. 230; *S. C.*, 227 U. S. 173; *Miller* v. *Thomas*, 36 L. D. 492; *Ehlainen* v. *Santa Fe Pac. R. R.*, 42 L. D. 578; *Re Walker*, 36 L. D. 495; *Sherar* v. *Frazer*, 40 L. D. 549; *La Fayette Lewis*, 33 L. D. 43; *William E. Moses*, 33 L. D. 333; *Smith* v. *State*, 40 L. D. 554; Instructions, 24 L. D. 589, 592; Instructions, 30 L. D. 28; *Kern Oil Co.* v. *Clarke*, 30 L. D. 550, 569; *S. C.*, 31 L. D. 288; *Gray Eagle Co.* v. *Clarke*, 30 L. D. 570; *Re Cobb*, 31 L. D. 220; *Santa Fe Pac. R. R.* v. *State*, 34 L. D. 12; *Re Walker*, 36 L. D. 495; *Sherar* v. *Veazie*, 40 L. D. 549.

The administration of the Forest Reserve Lieu Land Act of June 4, 1897, as amended by subsequent acts of Congress, is vested in the Land Department of the United States. Cases *supra* and *Wisconsin Cent. R. R. Co.* v. *Price Co.*, 133 U. S. 460; Regulations of Int. Dep't under act June 4, 1897, 24 L. D. 589; *Nasqually* v. *Gibbon*, 158 U. S. 155; *Knight* v. *Land Association*, 142 U. S. 161, 177; *In re Clarke*, 32 L. D. 233, 235; *Miller* v. *Thompson*, 36 L. D. 492.

The decisions of the Land Department upon questions of fact are conclusive. *De Cambra* v. *Rogers*, 189 U. S. 119; *Gertgens* v. *O'Connor*, 191 U. S. 237; *Johnson* v. *Drew*, 171 U. S. 93; *Love* v. *Flahive*, 205 U. S. 105; *Johnson* v. *Towsley*, 13 Wall. 72; *Marquez* v. *Frisbie*, 101 U. S. 473; *Quimby* v. *Conlan*, 104 U. S. 420; *Burfenning* v. *Chicago*, 163 U. S. 321; *Whitcomb* v. *White*, 214 U. S. 15.

Likewise its decisions upon mixed questions of law and fact. *Quimby* v. *Conlan*, 104 U. S. 420; *Whitcomb* v. *White*, 214 U. S. 15; *Ross* v. *Day*, 232 U. S. 114; *Moore* v. *Robbins*, 96 U. S. 530; *Gonzales* v. *French*, 164 U. S. 338.

The acts of the Executive Departments of the Government, when acquiesced in, and especially their interpretation of statutes which they are called upon almost daily to construe, if acquiesced in for a long time, are almost conclusive upon the courts. *Roughton* v. *Knight*, 219 U. S. 536; *Osborn* v. *Forsyth*, 216 U. S. 570; *Orchard* v. *Alexander*, 157 U. S. 373; *Knight* v. *Land Association*, 142 U. S. 161; *Parsons* v. *Venzke*, 164 U. S. 89; *Williams* v. *United States*, 138 U. S. 514, 524; *Kern Oil Co.* v. *Clarke*, 31 L. D. 288, 300; *Pacific Stock Co.* v. *Isaacs*, 96 Pac. Rep. (Ore.) 464.

The Secretary of the Interior is vested with large discretionary powers in the administration of the public land system. *Williams* v. *United States*, 138 U. S. 514, 524; *Knight* v. *Land Ass'n*, 142 U. S. 161, 177; *Fowler* v. *Dennis*, 41 L. D. 173.

The act of June 4, 1897, contemplates a common-law exchange of equal estates, which requires the assent of both parties thereto before the exchange is consummated. See Co. Litt., 50a *et seq.*; Butler & Hargrave's Notes; Shep. Touch. 294; 3 Words & Phrases, 2547; *United States* v. *McClure*, 174 Fed. Rep. 510; *Clearwater Timber Co.* v. *Shoshone Co.*, 155 Fed. Rep. 612; *Lessieur* v. *Price*, 12 How. 59, 74; *Roughton* v. *Knight*, 156 California, 123; *S. C.*, 219 U. S. 536; *Re Lewis*, 33 L. D. 43; *Re Moses*, 33 L. D. 333; *Re Hyde*, 28 L. D. 286, 290; *Opinions Asst.*

Atty.-Gen. Van Devanter, 28 L. D. 312, 472; 30 L. D. 105; *Kern Oil Co.* v. *Clarke*, 30 L. D. 550; *S. C.*, 31 L. D. 288, 294; *Gray Eagle Co.* v. *Clarke*, 30 L. D. 570; Instructions, 31 L. D. 225; *Re C. W. Clarke*, 32 L. D. 233, 235; *Miller* v. *Thompson*, 36 L. D. 492; *Smith* v. *Idaho*, 40 L. D. 554.

In case of rejection of lieu land applications the base lands are not lost. Cases *supra* and *Re Austin*, 33 L. D. 589; *Re Krebs*, 37 L. D. 143.

The selector of land under the exchange provisions of the act of June 4, 1897, is the owner of the base land and must pay taxes thereon until the selection is approved by the Commissioner of the General Land Office and the exchange consummated. *Weyerhauser* v. *Hoyt*, 219 U. S. 380, distinguished. Under the act of June 4, 1897, if the selection fails, the selector still retains the land he attempted to relinquish to the United States, and loses nothing. Cases *supra* and *Sjorli* v. *Dreschel*, 199 U. S. 564; *Grant* v. *Railway Co.*, 54 Iowa, 673; *Musser* v. *McRae*, 38 Minnesota, 409; *Page* v. *Price Co.*, 25 Washington, 6.

If dissatisfied, plaintiff should have brought mandamus against the Secretary of the Interior when the selections were finally rejected. *Osborn* v. *Forsyth*, 216 U. S. 570.

The decisions of the Interior Department construing the laws specially intrusted to it for execution, and the rules and regulations promulgated by it in the discharge of its duties, should not be disturbed or reversed except for the most cogent reasons. Rev. Stat., §§ 441, 453, 2478; *Knight* v. *Land Assn.*, 142 U. S. 161, 167; *Orchard* v. *Alexander*, 157 U. S. 372, 375; *Bishop of Nasqually* v. *Gibbon*, 158 U. S. 155, 166; *Parsons* v. *Venzke*, 164 U. S. 89, 91; *Gray Eagle Co.* v. *Clarke*, 31 L. D. 303, 306; *McMichael* v. *Murphy*, 197 U. S. 304; *Williamson* v. *United States*, 207 U. S. 425, 462; *Logan* v. *Davis*, 233 U. S. 613; *Small* v. *Rakestraw*, 196 U. S. 401.

Lands suspended from entry, or reserved by competent authority, and lands occupied or covered by an entry,

selection or filing, and mineral lands, are not subject to selection under the exchange provisions of the act of June 4, 1897. *Leaming* v. *McKenna*, 31 L. D. 318; *Kern Oil Co.* v. *Clarke*, 31 L. D. 288; *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Walcott* v. *Des Moines Co.*, 5 Wall. 681, 688; *Grisar* v. *McDowell*, 6 Wall. 363, 381; *Re Cal. Land Co.*, 33 L. D. 595; *Sante Fe Pac. R. R.* v. *California*, 34 L. D. 12; *Re Santa Fe Pac. R. R.*, 34 L. D. 119.

The decision of the Secretary of the Interior in the cases at bar followed a long line of decisions rendered by his predecessors. *Kern Oil Co.* v. *Clarke*, 30 L. D. 550; Instructions, 24 L. D. 589, 592; *Gray Eagle Oil Co.* v. *Clarke*, 30 L. D. 570; *Re Pavey*, 31 L. D. 186; *Re Cobb*, 31 L. D. 220; *Porter* v. *Landrum*, 31 L. D. 352.

The regulations promulgated by the Secretary of the Interior in pursuance of statute, have all the force and effect of law. *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301; *Knight* v. *Land Assn.*, 142 U. S. 161, 177; and see 2 L. D. 709; 5 L. D. 169; 6 L. D. 111; 9 L. D. 86, 189, 284, 353.

The law deals tenderly with the settler upon public lands. *Ard* v. *Brandon*, 156 U. S. 537, 543; *Shepley* v. *Cowan*, 91 U. S. 330, 338.

The courts of the United States take judicial notice of the regulations of the Land Department. *Caha* v. *United States*, 152 U. S. 211; *Leonard* v. *Lennox*, 181 Fed. Rep. 764; *Jones* v. *United States*, 137 U. S. 202, 216; *Jenkins* v. *Collord*, 145 U. S. 546, 560.

The final decision of the Interior Department of February 17, 1910, shows that the selections were never accepted by the Land Department, notwithstanding allegations in other parts of the amended bills of complaint to the contrary.

That plaintiff was awarded a decision by the Interior Department, prior to the final decision of February 17, 1910, in favor of defendants, gives him no standing, since the final decision alone determines the rights of the parties.

Potter v. *Hall*, 189 U. S. 292; *Greenameyer* v. *Coate*, 212 U. S. 434.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Daniels, the appellant here, was plaintiff in the trial court and appellant in the court below. In stating this case in its opinion the court below mentioned that there were fifteen other cases under submission in which Daniels also was the plaintiff in the trial court and the appellant before it and that all the cases involved substantially the same legal questions. The court, evidently considering that its conclusions in this disposed of the other cases, directed a judgment of affirmance not only in this but in the other fifteen cases. It would seem, since only fourteen of the cases besides this one are here, that in one of the cases no appeal was taken, but otherwise the situation which existed below obtains here, since this and fourteen other cases are before us for decision. For the appellant this case and the fourteen others were argued in one brief, but for the appellees the cases in the briefs are divided into groups presumably in consequence of what was assumed to be some material difference of fact between them. In passing upon the cases the court below substantially rested its conclusion upon what it decided was the power of the officers of the Land Department over the land entries which are the subject of the controversy, although in concluding its opinion the court intimated rather than decided that even if its views on the question of power were mistaken, there was a state of fact in this (and presumably in the other cases) which required a decision against Daniels, the appellant. 205 Fed. Rep. 235.

In the argument before us for the appellant it is not disputed that if the court below was right in its ruling as to the power of the Land Department, its conclusion in

this and all the other fifteen cases was correct and its decrees must be affirmed, since under the hypothesis stated there is no contention that there is any fact in this or any of the other cases which would justify a different conclusion. On the other hand, in the arguments for the appellees, although it is not disputed that if the court below erred in the proposition which it maintained concerning the power of the Land Department its decrees were wrong, it is nevertheless insisted that putting the proposition of power out of view, in some if not in all the cases particular facts were established which when properly considered would require an affirmance of the decrees.

Under these conditions to avoid repetition in the statement of the other cases, we proceed first in this case to dispose of the proposition as to the power of the officers of the Land Department in order, if it be found that such proposition was well founded, to decide this and all the other cases without going any further. In following this method we shall state the case on broad lines so as to present in bold relief the legal question for decision, paying no heed to facts not in any way involved in that question. If, after doing so, the power upheld by the court below be found not to exist we shall then examine the facts to determine how far they may control or influence the decision of the case.

In June, 1902, the State of Oregon prepared lists selecting lands in place of certain designated school lands for which it claimed to be entitled to be indemnified and these lists were filed in the local land office and were transmitted for approval to the Commissioner of the General Land Office. The State before such approval sold to Daniels the land covered by the lists including that with which this controversy is concerned. The Land Department subsequently refused to approve the state lists because of error concerning the school lands for which the right of indemnity was asserted. Daniels, the purchaser from the

State, was therefore without right in and to the land. Through the Governor of the State an arrangement was made with the Land Department by which the State might point out and substitute other school sections, the right to which had been lost, for those previously stated, and if it could not do so, on notice from the Department that its lists would be cancelled the State might relinquish its claim, if any, arising from the filing of the lists in favor of its vendees who on presentation of the relinquishment might enter the land which they had already bought from the State. The Department directed attention to the fact that in the meanwhile the right of the vendees to make the proposed entry would be indubitably preserved as the filing of the previous lists by the State had segregated the land and until the relinquishment was presented that segregation would continue, and further that if the relinquishment and the application to enter the lands were filed together, no danger of loss of right would exist. Daniels, to avail of this advantage, procured the Aztec Land and Cattle Company and one Perrin who owned land which had been included in the San Francisco Mountains Forest Reserve, in his interest and for his account to surrender said land to the United States under the provisions of the act of Congress of June 4, 1897 (c. 2, 30 Stat. 36), and to apply for the benefit of Daniels to enter as lieu land the land which he had bought from the State of Oregon. To accomplish this purpose it was understood that the relinquishments which the State had made of its rights, if any, to such land resulting from its filed lists should be delivered to the Land Office in connection with the application to enter the lieu lands, thus following the method suggested previously by the Land Department. Carrying out this purpose after compliance in every respect with the statute and with the regulations of the Land Department the application for the lieu lands was filed and the certificate of relinquish-

ment from the State was simultaneously handed to the proper Land Office.

When the applications were made it is not disputed that it was the duty of the local land officers on receipt of the application to file and transmit it to the Commissioner of the General Land Office for his approval, but for some reason best known to themselves they rejected the application and allowed subsequent entries in favor of other persons to be made under the homestead, timber and stone and other laws. From this there resulted a controversy which led to repeated directions by the Land Department to the local Land Office to allow the lieu entry, but which for one reason or another were not carried out, until finally in February, 1910, the whole subject came before the Secretary of the Interior on appeal from a ruling of the Commissioner of the General Land Office that the lieu entry was valid and again directing that it be allowed and consummated. In great detail reviewing the facts concerning the Daniels purchase from the State of Oregon and his obtaining the relinquishment conformably to the instructions of the Department, after holding that his perfect good faith was established and after finding as a matter of fact that the application for the entry of the lieu lands and the relinquishment from the State had been filed simultaneously in the local Land Office although the relinquishment had not been marked by the local officers as filed until afterwards, the Secretary came to review the controversy which had followed and to state his general conclusions as to the entry of the lieu lands as follows:

"It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries

for most of these lands. It is thought however, that in instances where the Land Department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition. See *Hoyt* v. *Weyerhauser et al.* (161 Fed. Rep. 324)."

Giving effect to these opinions the Secretary of the Interior decided that the entries subsequent in date to the Daniels or lieu land entries should be maintained except as to certain of said subsequent claims which were held to be subordinate to the Daniels or lieu land claims for reasons which we need not notice. When this action of the Secretary was carried into effect by the Land Department this suit was brought charging that by error of law of the Department of the Interior Daniels had been deprived of his right to enter the land and seeking to charge the defendants to whom the right to enter the land had been awarded or those holding under them with a trust in favor of Daniels. The averments of the bill were full and embraced the facts above recited and the opinion of the Secretary rendered in 1910 was made a part of the bill. The bill was demurred to as stating no case for relief. It was amended and again demurred to for the same reason. The trial court sustained the demurrer and in substance held that the Land Department had the discretionary power to award the lands, without reference to the priority of the applications, to the persons selected as a result of taking into account the general equitable considerations stated in the opinion of the Secretary of the Interior which

we have already quoted. On appeal the decree of the trial court was affirmed. It was held that the Land Department as to the character of the entries in question possessed the discretionary power which was relied upon by the Secretary of the Interior as the basis for his action although it was held or intimated in considering a decision of this court that the discretionary power asserted could not be applied to indemnity selections made by a railroad company under a railroad grant. In concluding the court said:

"But there is additional ground for sustaining it in the fact that, at the time when the appellant's selection was initiated on February 8, 1904, the lands involved herein appeared upon the records of the local Land Office as selected by the State of Oregon by certain school indemnity lists, and that those lists were not relinquished by the State until February 10, 1904. This sufficiently appears from the decision of the Secretary of the Interior, which is made an exhibit to the bill and is controlling in so far as it varies from the allegations of the bill. *Greenameyer* v. *Coate*, 212 U. S. 434, 443."

This brings us to determine whether the Land Department had a right to reject a prior lieu land entry or entries and award the land to subsequent and subordinate applicants under the assumption that it possessed a discretionary right to do so, an authority the possession of which was sustained by both the courts below.

In primarily testing the proposition from the point of view of principle it is well at once to exactly fix its true import. In doing so it is to be conceded, *a*, that the act of Congress gave the right to one whose land had come to be included by operation of law in a forest or other reservation to apply to the Land Office and obtain the right to enter an equal amount of public land upon the surrender to the United States of the land situated in the reservation and upon the doing and offering to do everything required

by the law or the lawful regulations of the Land Department to be done or offered to be done for that purpose; *b*, that in the particular case the application to enter the lieu land came within the grant of the statute and all that was required by law or lawful regulation was done by the applicant in order to obtain entry, and *c*, that it was the plain duty of the proper authorities of the Department on the filing of the entry in due course under the law to grant it. When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where under an Act of Congress a right is conferred to make an application to enter public land and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done and thus deprive the individual of the right which the law gives him. And it becomes moreover certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation. And the inherent vice which thus clearly appears from the mere statement of the proposition when reduced to the ultimate conceptions which it involves is not relieved by the suggestion that the action taken in this case by the Department rested not upon the assumption that there was a general discretion, but upon the assumption that such discretion arose because of the pri-

mary mistake made by the local land officers concerning the lieu entry and the allowance of the filing of claims which were subsequent in date. We say this because thus seemingly to limit the discretionary power exerted would in our opinion aggravate its manifest unsoundness for the power as thus qualified would come to this: That the commission of a wrong by the officers of the Department in disobeying the Act of Congress and in denying to an individual a right expressly conferred upon him by law would become the generating source of a discretionary power to make the disobedience of law lawful and the taking away of the right of an individual legal. But this in another form of statement brings the proposition back to its real and essential basis.

Let us consider the subject from the point of view of the authorities relied on as sustaining the possession of the discretionary power by the Land Department, first, from the point of view of the opinion expressed by the Secretary of the Interior and second, from that of the court below in affirming the action of that officer. As to the first, it is to be observed that the only authority referred to was the case of *Hoyt* v. *Weyerhaeuser*, decided April 17, 1908, in the Circuit Court of Appeals for the Eighth Circuit, 161 Fed. Rep. 324, and that therefore the ruling was not the result of any prior administrative rule or practice of the Department asserting the existence of the administrative authority which the proposition involves. We do not stop to point out that in our opinion the ruling in *Hoyt* v. *Weyerhaeuser* did not sustain the right to exert the discretionary authority which it exercised, since that case after the action of the Land Department was reviewed in this court and reversed upon reasoning which negatives the assumption that the Department possessed the discretionary authority which it assumed it had. *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380.

As to the second, while the court below likewise re-

ferred to no practice or ruling of the Land Department asserting the possession by the Department of the latitude of discretion which it exercised, that power was sustained and the lawfulness of its exertion in the present case established by the ruling in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301. While thus understanding the *Cosmos Case* the court recognized that the decision in *Weyerhaeuser* v. *Hoyt* was in conflict with such view if that decision was applicable to the case before it, which the court concluded was not the case because it must be restricted to applications for indemnity selections made by a railroad company under a railroad grant and therefore did not relate to lieu land selections applied for under the Act of 1897. But we are of opinion that this interpretation of the *Cosmos Case* cannot be justified. In the first place we can discover no reason for holding that the *Cosmos Case* either expressly or by any reasonable implication sustained the assumption that there existed in the Land Department in the case of lieu land entries or any other the vast latitude of discretion involved in the proposition which was sustained. It is true in the *Cosmos Case* it was decided that courts would not interfere with the right of the Department to pass upon a question which it had the power to decide as a prerequisite to allowing a lieu entry under the Act of 1897, but that ruling has no relation to the question of the right of the Department after it had passed on the prerequisites required for the entry under the Act of 1897 and after it had decided that they had all been complied with, to deny the right of the applicant to enter and under the theory of a discretion possessed to permit a later applicant to take the land, thus depriving the first applicant of the right conferred upon him by the Act of Congress. The difference between the two is that which must obtain between the power to decide on the one hand whether the prerequisites

to an entry exist and the right on the other of the Land Department after finding that an applicant has fully complied with the law and is entitled to make the entry which he asks, to permit somebody else to enter the land under the assumption that the law vests a discretion which enables that to be done.

It is true again that in the *Cosmos Case* the court declined to hold that the Department was not at liberty to determine the question as to the mineral character of the lands sought to be entered because that inquiry arose after entry and before its final allowance, a ruling which but in a different form illustrates the broad distinction which we have just pointed out. It is also true that *Weyerhaeuser* v. *Hoyt* concerned a question of the selection of indemnity lands by a railroad company under a railroad grant, but the reasoning in that case, we are of opinion, in the very nature of things is repugnant to the possibility of the possession of the discretionary power in the Department here asserted.

There being then no basis for the assumption of a discretionary power on the part of the Land Department upon which the lieu land entry or entries were finally rejected and the land awarded to other entrymen who were later in time, the bill stated a cause of action sustaining the relief prayed unless the demurrer was rightly maintained for some other reason. And for the purpose of considering that subject we state under one heading the questions involved in its solution.

From the point of view that it is established that error of law was committed by the Land Department in assuming that it had a discretion to reject the lieu entry, is its action nevertheless sustainable because of the suggestion made by the court below in closing its opinion, or for any other fact or reason pressed in argument?

These considerations are, of course, as the matter went off on a demurrer, to be determined by the bill

and the opinion of the Secretary of the Interior of 1910, which was annexed to the bill. Although in considering and disposing of the question of law we have given a summary of the proceedings in the Land Department, we refer more fully to the subject. The application to make the lieu entry was presented to the local land office February 8, 1904. After its rejection the applicant for the entry appealed, the date not being given. On this appeal the decision of the local land officers was affirmed by the Commissioner of the General Land Office, the date not being given, and on appeal to the Secretary of the Interior, the local land officers and the Commissioner of the General Land Office were reversed, October 25, 1905, and the local officers were directed to allow the lieu entry. This order was not carried out because the local land officers declined to do so upon the ground that the land covered by the lieu entry was included in a named reservation, and on appeal taken by the lieu entrymen the Commissioner of the General Land Office reversed the action of the local officers, January 23, 1906, and sent the matter back with directions to the local land officers to allow the lieu entry or entries "as of date February 8, 1904, the day on which they were originally presented, if no other objection appeared." What then ensued is thus stated by the Secretary in his opinion:

"Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office [General Land Office] upon the said applications, and stated there were objections to the allowance of the same, in that there were various homestead and timber and stone applications which had been allowed subsequently to the cancellation of the State's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

"Separate appeals were taken by the Aztec Land and

Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

"Upon consideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels was entitled to protection as a bona fide purchaser from the State; that the State's selections were filed January 28, 1902, while the lands were sold on January 21st, preceding, at which time they were public lands of the United States, and no one purchasing them could claim to be a bona fide purchaser from the State; that as late as October 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a bona fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed; and if he had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a bona fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the general land laws; that to concede to him this privilege under letters October 17 and 13, 1903, mentioned above, would in effect, be to make such persons, as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's lists invalid for want of sufficient base, the filing of the State's relinquishment, and the protection of

the purchaser from the State by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

"A motion for review of said decision of June 26th, 1906, having been filed by Daniels, the Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels was not, strictly speaking, a bona fide purchaser from the State, because the certificates of sale issued by the State antedated the filing of the school indemnity selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a bona fide purchase.

"The decision of June 26th, 1906, was therefore recalled, and it was ordered that the lieu selection should be reinstated."

As additionally stated by the Secretary in his opinion, the Commissioner of the General Land Office transmitted the decision just stated to the local land officers along with the lieu entry or entries for allowance and instructed those officers to notify the parties who had been allowed to make entries subsequent to the filing of the lieu applications to show cause why their entries should not be cancelled.

Thereupon as further stated by the Secretary, "a petition termed a motion for re-review of Departmental Decisions of May 15 and 18, 1907, was filed on behalf of Archie Johnson who claimed a part of the lands under a sale made thereof under the Public Land Laws. This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved; that the entire

proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the Public Land Laws."

And it was the controversy which arose from this petition which took the subject again before the Commissioner of the General Land Office and to the Secretary of the Interior and which led to the final decision of the Department of 1910 with which we are dealing maintaining the right of the lieu entrymen, and in which as we have previously seen in discussing the question of discretion the Department explicitly and finally found (1) that Daniels as a matter of fact was in good faith in his dealings concerning the purchase of the land from the State of Oregon and the receipt from the State of its relinquishment, and (2) that the application for the lieu entry or entries and the relinquishment by the State were presented to the Land Office for filing at one and the same time. Because of its conclusive effect upon that aspect of the question we append in the margin the finding made by the Secretary of the Interior on this subject.[1]

[1] "It is true the record shows that the relinquishments were not marked, filed, in the local office until February 10, 1904, which was two days after the presentation of the scrip applications.

"It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been received on February 8, instead of February 10, the filing would have been noted on the day they were received.

"But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

"The filing was by mail, and the letter of transmittal was written by Daniels' attorney, the said L. T. Barin.

"The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the

Under these conditions it is apparent that the suggestion made in the opinion of the court below was either inadvertent or, if not, was clearly without foundation, a result as to which there is no room for controversy in view of the express finding by the Department of the simultaneous presentation of the relinquishment and the application for the lieu entry or entries, since it constitutes a finding of fact by the Department which it was within its province and its duty to make and which the courts have no power to review. And from this it follows that any attempt to base a right in favor of persons entering subsequently because of the failure of the local land officers to file, would reduce the case at once to the contention that one who had done everything essential, exacted either by law or the regulations of the Department, to obtain a right from the Land Office conferred upon him by Congress, could be deprived of the same either by the exercise of discretion or by a wrong committed by the land officers.

In addition in the brief for the appellee in this case

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action of the local officers at the time in rejecting the proffered scrip applications is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

"It is worthy of [notice] too, that there has not been found any correspondence of record which would indicate that if the said Barin had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

"I conclude, therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be in your office report of September 28th, 1903, above quoted."

various mixed contentions of law and fact are stated under six propositions which it is deemed establish that the demurrer was rightly sustained even although the Land Department did not possess the discretion which it assumed it had. Some of them we think too obviously devoid of merit to require anything but statement. For instance, the contention that because a patent of the United States is involved, therefore the United States is a necessary party. As to the others we think whatever be their merit, as to which we intimate no opinion, they plainly concern themselves with the merits of the case and have no tendency to establish the proposition that the demurrer was rightly sustained. Thus, so far as the final action of the Secretary was concerned we think under the averments of the bill and on the face of the Secretary's opinion it is to be assumed that the necessary parties to enable the Secretary to act were before him and that this carries with it, at least for the purposes of the hearing on the merits, the question whether there was an insufficiency of parties in the previous hearings.

Our conclusion therefore is that the judgment sustaining the demurrer was wrong and it must be and is reversed and the case is remanded for further proceedings in accordance with this opinion.

Reversed.